115-363

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~289~~. 34

THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR,

vs.

EDWARD P. ALLIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 3, 1882.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in said district, on the first Monday (being the second day) of January, A. D. 1882—present and presiding, the Honorable Charles E. Dyer, district judge; and also present Henry Fink, marshal, and Edward Kurtz, clerk—among other the following proceedings were had, to wit:

EDWARD P. ALLIS
vs.
THOMAS J. POPE & JAMES E. POPE. } At Law.

Be it remembered that heretofore, to wit, at a special term of said court, begun and held at the city of Milwaukee, on the second Thursday (being the twelfth day) of May, A. D. 1881, present, the Honorable Charles E. Dyer, district judge, presiding, and on the first day thereof, to wit, on the twelfth (12th) day of May, A. D. 1881, the following proceedings were had, to wit:

Order Docketing Case.

EDWARD P. ALLIS
vs.
THOMAS J. POPE & JAMES E. POPE. } At Law.

2 This day came the defendants, by their counsel, Messrs. Finches, Lynde & Miller, and presented to the court copies of the process, complaint, and proceedings in this cause, certified from the county court of Milwaukee county, in this district, pursuant to an order of said court removing said cause to this court, including copies of the petition and bond of said defendants required by law for such removal, and of said order of removal. Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court and be proceeded with in the same manner as if it had been commenced here by original process, which certified copies are as follows, to wit:

Certified Copies from State Court. Summons.

County Court, Milwaukee County.

EDWARD P. ALLIS, Plaintiff,
vs.
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brothers, Defendants.

The State of Wisconsin to the said defendants:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend

the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

JENKINS, ELLIOTT & WINKLER,
Plaintiff's Attorneys.

3 P. O. address, 401 East Water St., Milwaukee, Wisconsin.

MILWAUKEE COUNTY, *vs:*

I certify that, after using due diligence, search, and inquiry, I could not find the within-named defendants, Thomas J. Pope or James E. Pope, or either of them, in my county. I am informed, and believe the information to be true, that they, or either of them, are not residents of this State.

Milwaukee, December 7th, 1880.

PETER VAN VECHTEN, JR., *Sheriff.*

Fees, $1.00.

Filed Dec. 9, 1880. Julius Wechselberg, clerk.

Complaint.

County Court, Milwaukee County.

EDWARD P. ALLIS
against
THOMAS J. POPE and JAMES E. POPE, copartners under the firm name of Thomas J. Pope & Brother.

The complaint of the above-named plaintiff against the above-named defendants shows—

1st. That at the times herein named said defendants were, and they now are, copartners in business under the firm name and style of Thomas J. Pope & Brother.

2nd. That on or about the 7th day of January, 1880, said defendants agreed with this plaintiff to sell and deliver to this plaintiff, to be shipped to and delivered at the city of Milwaukee after the opening of navigation then ensuing, five hundred tons of number one extra iron, the same being a class of pig-iron of a certain well known and recognized standard of quality, at thirty-four dollars
4 per ton, to be paid for upon the receipt by this plaintiff of bills of lading of said iron & before the delivery of the same to this plaintiff; this plaintiff also to pay the freight on said iron and one dollar per ton for conveying the same from the furnace to the place of loading, and interest at the rate of six per cent. per annum for four months on said price of the iron.

That pursuant to said agreement this plaintiff afterwards, and on and about the 9th day of May, 1880, at the request of the defendants, and upon the receipt of bills of lading of what purported to be the iron so contracted for, and before said iron had arrived in the city of Milwaukee, or this plaintiff had seen or had had any opportunity to see or inspect the same, paid said defendant on account of said

iron the sum of seventeen thousand eight hundred & forty dollars ($17,840), being the price of said iron, with six per cent. interest thereon for four months, and one dollar per ton for carrying same from the furnace to place of loading or shipment.

That afterwards, and on or about the 26th day of June, 1880, and before the delivery of said iron to this plaintiff, and before he had seen or had any opportunity to see or inspect the same, this plaintiff was obliged to pay, and did pay, the sum of seventeen hundred and fifty dollars freight on the same.

That afterwards, on or about the 15th day of July, 1880, said iron was delivered to this plaintiff; that this plaintiff thereupon
5 inspected the same and found that the iron so shipped and delivered to this plaintiff was not the quality of iron so as aforesaid purchased and contracted for, and this plaintiff alleges that the iron so to him shipped and delivered was not number one extra iron, but in quality greatly inferior thereto, and not of the quality or standard of such iron, or the iron he had purchased of or contracted for with said defendants, but greatly inferior thereto in value and quality; that this plaintiff therefore refused to accept, and hath not accepted the same, but deposited the same on his premises subject to the order and disposal of the defendants, of all of which he immediately informed said defendants; that in unloading and piling said iron this plaintiff necessarily incurred a great expense, ttha is to say, the sum of two hundred and fifty dollars; that, although notified as aforesaid, defendants have not taken away or removed the said iron, but the same still remains stored for the benefit of the defendants on this plaintiff's premises, and that the storage thereof to the present time is well and reasonably worth the sum of one hundred and eighty-four dollars.

That said defendants have in no way complied with or attempted to comply with their said contract by sending or shipping any iron to this plaintiff, except the iron aforesaid, and, although said iron is not of the quality purchased or contracted for, but greatly in-
6 ferior thereto, and the plaintiff has not accepted the same, of all of which said defendants were duly advised, nevertheless said defendants, although thereunto requested, have neglected & refused, and still neglect and refuse, to repay to this plaintiff the sum of money paid them, and the freights and expenses paid by the plaintiff on account of said iron as aforesaid, and said defendants are now indebted to the plaintiff on account of the premises in the sum of twenty thousand and twenty-four dollars, with interest at the rate of seven per cent. per annum on seventeen thousand eight hundred and forty dollars thereof from the 9th day of May, 1880; on seventeen hundred and fifty dollars thereof from June 26th, 1880, and on two hundred and fifty dollars thereof from July 15th, 1880.

Wherefore the plaintiff demands judgment against the defendants for said sum of twenty thousand and twenty-four dollars, with interest thereon as heretofore stated, and the costs of this action.

JENKINS, ELLIOTT & WINKLER,
Plaintiff's Attorneys.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Edward P. Allis, of said county, being duly sworn, says: That he is the plaintiff in this action; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated on information & belief, and as to those he believes it to be true.

ED. P. ALLIS.

Subscribed & sworn to before me, this 6th day of December, 1880.

A. G. MILLER,
Notary Public, Mil. Co., Wis.

7 [Endorsed:] County court, Milwaukee county. Edward P. Allis *vs.* Thomas J. Pope *et al.* Sum's & compl't. Jenkins, Elliott & Winkler, pl'ff's att'ys. Filed Dec. 9, 1880. Julius Wechselberg, clerk.

State of Wisconsin, County Court of Milwaukee County.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE & JAMES E. POPE, Defendants.

MILWAUKEE COUNTY, *ss:*

Edward P. Allis, of said county, being duly sworn, says: That he is the plaintiff in this action; that the defendants in this action are non-residents of the State of Wisconsin, and each of them is a non-resident thereof; that they have property within this State, to wit, about five hundred tons of iron, which has been seized on a writ of attachment issued in this case; that the plaintiff is unable with due diligence to make, or cause to be made, service of the summons in this action on the defendants within this State, and that the post-office address of each of said defendants is No. 292 Pearl street, New York, in the State of New York.

ED. P. ALLIS.

Subscribed & sworn to before me, this 8th day of December, 1880.

EDW. P. ALLIS, JR.,
Notary Public, Milw. Co.

8 [Endorsed:] County court, Milwaukee county. Edward P. Allis *vs.* Thomas J. Pope *et al.* Aff't. Filed Dec. 9, 1880. Julius Wechselberg, clerk.

State of Wisconsin, County Court of Milwaukee County.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Defendants,

Upon the plaintiff's verified complaint, and the further affidavit of the plaintiff, all duly filed, whereby it appears that the defendants are non-residents of this State; that they have property within the

same which has been attached in this action; that a cause of action exists in favor of the plaintiff against said defendants, and the court has jurisdiction of the subject of the action, and that the plaintiff is unable with due diligence to make service upon the defendants within this State, and that the post-office address of said defendants is No. 292 Pearl St., New York, in the State of New York—

On motion of Jenkins, Elliott & Winkler, attorneys for the plaintiff, it is ordered that service of the summons in this action be made by its publication in the Wisconsin Legal News, a newspaper published in the city & county of Milwaukee, which is hereby desig-
9 nated as most likely to give notice to the defendants, for six weeks, not less than once in each week, and that on or before the day of the first publication, the plaintiff deposit in the post-office, in the city of Milwaukee, a copy of the summons, together with a copy of the complaint, securely enclosed in an envelope, with the postage paid thereon, for each of the defendants, addressed to the defendants, respectively, at the aforesaid post office address, or that, at the plaintiff's option, a copy of the summons and a copy of the complaint be delivered to each of the defendants, personally, out of the State, which when done shall have the same effect as a completed publication & mailing.

J. E. MANN, *County Judge.*

Dated Dec. 9th, 1880.

[Endorsed:] County court, Milwaukee county. Edward P. Allis ag'st Thomas J. Pope *et al.* Order of publication. Filed Dec. 9, 1880. Julius Wechselberg, clerk.

Writ of Attachment.

THE STATE OF WISCONSIN:

County Court, County of Milwaukee.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brother, Defendants.

10 We, the undersigned disinterested freeholders of Milwaukee county, having been summoned by the sheriff of Milwaukee county to appraise certain property seized by said sheriff by virtue of a writ of attachment in the above-entitled action, and having first been duly sworn by said sheriff to make a true appraisal thereof, do hereby certify that we have appraised the same as follows:

500 tons of one & two pig-iron, at $23.25 pr. ton, making the total sum of eleven thousand six hundred and twenty-five dollars ($11,625).

December 8th, 1880.

HENRY LLEWELLYN,
GARAINER CAMPBELL,
Appraisers.

Affidavit of Attachment.

County Court, County of Milwaukee.

EDWARD P. ALLIS, Plaintiff,
ag't
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brother, Defendants.

COUNTY OF MILWAUKEE, *ss:*

Edward P. Allis, being duly sworn, says: That he is the above-named plaintiff; that the above-named defendants are indebted to the plaintiff in a sum exceeding fifty dollars; that is to say, in the sum of twenty thousand seven hundred and ninety-nine dollars and fourteen cents, over and above all legal set-offs, and that the same is due upon express contract.

11 And this deponent further says that he knows that said defendants are not residents of the State of Wisconsin.

ED. P. ALLIS.

Subscribed and sworn to before me, this 6th day of December, 1880.

A. G. MILLER,
Notary Public, Milwaukee Co., Wis.

Undertaking on Attachment.

County Court, County of Milwaukee.

EDWARD P. ALLIS, Plaintiff,
ag'st
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brother.

The above-named plaintiff, having applied for a writ of attachment against the property of the above-named defendants, Thomas J. Pope and James F. Pope, copartners under the firm name of Thomas J. Pope & Brother:

We, Edward P. Allis, of the county of Milwaukee, State of Wisconsin, and Edwin Reynolds, of said place, do undertake, pursuant to the statute in such case made and provided, in the sum of two hundred and fifty dollars, that if the said defendants recover judgment in this action, the above-named plaintiff will pay all costs that may be awarded to the above-named defendants, and all damages which the said defendants may sustain by reason of the said attachment, not exceeding the sum above-mentioned.

Dated Milwaukee, December 6th, 1880.

EDWIN REYNOLDS.
ED. P. ALLIS.

COUNTY OF MILWAUKEE, *ss:*

Edwin Reynolds, one of the subscribers to the foregoing
12 undertaking, being sworn, says: That he a resident and freeholder within this State, and is worth the sum of five hun-

dred dollars in property within this State, over and above all his debts and liabilities, and exclusive of all property exempt from execution.

EDWIN REYNOLDS.

Subscribed and sworn to before me, this 6th day of December, 1880.

A. G. MILLER,
Notary Public, Milwaukee Co., Wis.

Writ of Attachment.

STATE OF WISCONSIN, } *ss.*:
County Court Milwaukee County, }

The State of Wisconsin to the sheriff of the county of Milwaukee, Greeting:

Whereas an application has been made for a writ of attachment against the property of Thomas J. Pope and James E. Pope, copartners under firm name of Thomas J. Pope and Brother, defendants in an action commenced in this court, wherein Edward P. Allis is plaintiff, and annexed hereto is an affidavit and undertaking on the granting of this writ, pursuant to the provisions of chapter 124 of the Revised Statutes, entitled "Of Attachment."

And it appears from said affidavit that the whole amount due the said plaintiff is the sum of twenty thousand seven hundred and ninety-nine $\frac{14}{100}$ dollars.

Now, you are hereby commanded and required to attach and safely keep all the property of the said defendants, Thomas J. Pope and James E. Pope, within your county, or so much thereof
13 as may be sufficient to satisfy the plaintiff's demand, together with the costs and expenses, as a security for the satisfaction of such judgment as the said plaintiff may recover in said action.

Witness the Honorable John E. Mann, judge of the county court of Milwaukee county, at Milwaukee, this sixth day of December, A. D. 1880.

[SEAL.] JULIUS WECHSELBERG, *Clerk.*

JENKINS, ELLIOTT & WINKLER,
Plaintiff's Attorneys.

MILWAUKEE COUNTY, *ss:*

I certify that at the city and county of Milwaukee, on the 6th day of December, A. D. 1880, by virtue of the within writ of attachment, I attached all the right, title, and interest of the within-named defendants, Thomas J. Pope and James E. Pope, or either of them, in and to the five hundred tons (more or less) of pig-iron in the yard or about the premises known as lot number (9) nine and south ($\frac{1}{2}$) half of lot number eight (8), in block sixty-seven (67), in the fifth (5th) ward of the city of Milwaukee. The said five hundred tons of pig-iron (more or less) was attached as the property of the within-named defendants, Thomas J. Pope and James E. Pope.

I further certify that I made an inventory of the property so at-

tached, and caused the same to be appraised by two disinterested freeholders of said county, Henry Llewellyn and Garainer Campbell, who were first duly sworn by me to make a true appraisel thereof, which inventory and appraisement are hereto attached and returned.

I further certify that, after using due diligence, search, and
14 inquiry, I could not find the within-named defendants, Thomas J. Pope or James E. Pope, or either of them, or any duly authorized agent or attorney of theirs, upon whom I could serve the within writ of attachment, affidavit, and undertaking, in my county. I am informed, and believe the information to be true, that the within-named Thomas J. Pope and James E. Pope are not residents of this State, and that neither of them are now in the county of Milwaukee.

I further certify that I now have the property in my possession, and hereby return this writ of attachment to the court to abide the further action thereof.

Milwaukee, December 8th, 1880.

PETER VAN VECHTEN, JR., *Sheriff.*

Fees:

Service	$1 00
Travel	40
Bond	50
Swearing appraisers	1 00
Paid appraisers	2 00
Making inventory	1 00
Return	75
	$6 65

[Endorsed:] County court Milwaukee county. Edward P. Allis *vs.* Thomas J. Pope *et al.* Affidavit, undertaking, and writ of attachment. Filed Dec. 14, 1880. Julius Wechselberg, clerk.

County Court Milwaukee County.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Defendants.

15 Please take notice that we are retained by and appear for the defendants, Thomas J. Pope and James E. Pope, in the above-entitled action.

Yours, &c., FINCHES, LYNDE & MILLER,
Attorneys for Defendants.

Dated Milwaukee, Jan 3d, 1881.

To JENKINS, ELLIOTT & WINKLER,
Attorneys for Plaintiff.

[Endorsed:] County court Milwaukee county. Edward P. Allis, pl'ff, *vs.* Thomas J. Pope *et al.*, def'ts. Notice of appearance. Finches,

Lynde & Miller, attorneys & counsellors, 1, 2, and 3 Library Building, Milwaukee. Service of the within notice admitted this 8th day of Jan., A. D. 1881. Jenkins, Elliot & Winkler, plaintiff's attorneys. Filed Jan. 8, 1881. Julius Wechselberg, clerk.

County Court Milwaukee County.

EDWARD P. ALLIS, Pl'ff,

vs.

THOMAS J. POPE and JAMES E. POPE, copartners, under the firm name of Thomas J. Pope & Brothers.

To the county court of Milwaukee county:

The petition of Thomas J. Pope and James E. Pope, the defendants in the above-entitled cause, respectfully shows and alleges that at the date of the commencement of the above-entitled suit, and long prior thereto, your petitioners, and each of them, were, and still are, citizens and residents, the said Thomas J. Pope of the State of New York and the said James E. Pope of the State of New Jersey.

And your petitioners further allege that at the date of the commencement of the above-entitled suit, and long prior thereto, the said plaintiff, Edmund P. Allis, was, and still is, a citizen
16 and resident of the State of Wisconsin.

And your petitioners allege that the said above-entitled suit is now pending in the county court of Milwaukee county, State of Wisconsin, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs; that the said suit has not yet been brought to trial, and that the first term of the county court at which said suit can be brought to trial will commence in the city of Milwaukee, on the 14th day of March, A. D. 1881.

And your petitioners allege that they are desirous to remove said above-entited suit from said county court of Milwaukee county to the circuit court of the United States in and for the eastern district of Wisconsin, and your petitioners herewith present a bond, with good and sufficient surety, for your petitioners entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against petitioners, and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded, if said circuit court shall hold that this cause was wrongfully or improperly removed thereto; and also for their appearing and entering special bail in said suit, if special bail was originally requisite therein. And your petitioners hereby offer to furnish such additional surety as this honorable court shall require.

17 Wherefore your petitioners pray this court to accept said petition and bond, and that the said above-entitled cause may be removed to the circuit court of the United States in and for the eastern district of Wisconsin, and that all proceedings in the said

county court in said above-entitled cause may and shall be stayed, and that said court proceed no further in the said action, and that your petitioners may have such other further or different relief as under the acts of Congress in that behalf they may be entitled to. And your petitioners will ever pray, &c.

Dated January 3d, 1881.

THOS. S. POPE.
JAMES E. POPE.

STATE OF NEW YORK, } ss:
County of New York, }

Thomas J. Pope and James E. Pope, being severally duly sworn, depose and say, and each for himself deposes and says: That he is one of the above named petitioners; that he has read the foregoing petition, subscribed by him, and knows the contents thereof, and that the same is true in substance and in fact to his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

THOS. J. POPE.
JAMES E. POPE.

Subscribed and sworn to before me, this 3d day of January, A. D. 1881.

[SEAL.] WM. M. BRUCE,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Wm. M. Bruce, 18 before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 3 day of Jan'y, 1881.

[SEAL.] WM. A. BUTLER, *Clerk.*

Know all men by these presents, that we, Thomas J. Pope and James E. Pope, as principals, and Edward H. Broadhead, of the city of Milwaukee, Wisconsin, as surety, are held and firmly bound unto Edward P. Allis in the sum of one thousand dollars, to be paid to the said Edward P. Allis' executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the third day of January, A. D. 1881.

Whereas the above-bounden Thomas J. Pope and James E. Pope

have petitioned the county court of Milwaukee county, State of Wisconsin, for the removal of a cause therein pending, wherein Edward P. Allis is plaintiff and Thomas J. Pope and James E. Pope are defendants, to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

19 Now, therefore, the condition of the above obligation is such that if the above-bounden Thomas J. Pope and James E. Pope shall enter in such circuit court, on the first day of its next session, a copy of the record in such suit, copies of the process against petitioners, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation shall be null and void; otherwise, of force.

THOS. J. POPE. [SEAL.]
JAMES E. POPE. [SEAL.]
E. H. BROADHEAD. [SEAL.]

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I, Edward H. Broadhead, of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Wisconsin, and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution.

E. H. BROADHEAD.

Subscribed and sworn to before me, this 7th day of January, A. D. 1881.

[SEAL.] BENJ. K. MILLER, JR.,
Notary Public.

STATE OF NEW YORK, } ss:
City and County of New York, }

20 On this third day of January, 1881, before me, William M. Bruce, a notary public in and for the city and county of New York, duly commissioned and sworn, personally came Thomas J. Pope and James E. Pope, to me well known, and known to me to be the individuals described in and who executed the foregoing bond as principals, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

[SEAL.] WM. M. BRUCE,
Notary Public, N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, William A. Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby notify that Wm. M. Bruce, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 3 day of Jan., 1881.

[SEAL.] WM. A. BUTLER, *Clerk.*

21 [Endorsed:] County court, Milwaukee county. Edward P. Allis, pl'ff, *vs.* Thomas J. Pope *et al.*, def'ts. Undertaking for removal. Filed Jan. 8, 1881. Julius Wechselberg, clerk. Finches, Lynde & Miller, attorneys & counsellors, 1, 2, & 3 Library Building, Milwaukee.

County Court, Milwaukee County.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Defendants.

On the petition and undertaking, and on the records, pleadings, and papers on file in this case, and on motion of Finches, Lynde & Miller, attorneys for above-named defendants—

It is hereby ordered that plaintiff show cause, at the court-house in the city and county of Milwaukee, on Saturday, the 15th day of January, 1881, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the place of trial in this action should not be changed from the county court of Milwaukee county to the circuit court of the United States for the eastern district of Wisconsin.

And it is further ordered that until the further order of this court all proceedings on the part of the plaintiff be, and are hereby, stayed.

And it is further ordered that a copy of this order be served on Jenkins, Elliott and Winkler, plaintiff's attorneys, within two days after the date hereof.

January 8th, 1881.

J. E. MANN,
County Judge.

22 [Endorsed:] County court, Milwaukee county. Edward P. Allis, pl'ff, *vs.* Thomas J. Pope *et al.*, def'ts. Order to show cause. Finches, Lynde & Miller, att'ys for def'ts. Filed Jan. 8, 1881. Julius Wechselberg, clerk.

County Court, Milwaukee County.

EDWARD P. ALLIS *vs.* THOMAS J. POPE *et al.*

Rec'd copy of petition for removal, undertaking for removal, and order to show cause in above-entitled cause this 8th day of January, 1881, at 2.40 p. m.

JENKINS, ELLIOTT & WINKLER,
Plaintiff's Att'ys.

[Endorsed:] County court, Milwaukee county. Edward P. Allis, pl'ff, *vs.* Thomas J. Pope *et al.*, def'ts. Admission of rec'pt of petition, bond & order to show cause. Filed Jan. 8, 1881. Julius Wechselberg, clerk.

The State of Wisconsin, County Court, Milwaukee County.

EDWARD P. ALLIS, Pl'ff,
vs.
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope and Brother.

23 Upon filing the petition of Thomas J. Pope and James E. Pope for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin, and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for the petitioners—

It is hereby ordered that the security of the petitioner be accepted, and that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wisconsin copies of the record, and of the process against said petitioners, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that all further proceedings in this case be, and are hereby, stayed in this court.

Dated Milwaukee, January 15th, A. D. 1881.

By the court: J. E. MANN,
County Judge.

[Endorsed:] County court, Milwaukee county. Edward P. Allis, pl'ff, *vs.* Thomas J. Pope *et al.*, def'ts. Order for removal. Service of within admitted, this 15th day of Jan., 1881. Jenkins, Elliott & Winkler, pl'ff's att'ys. Filed Jan. 15, 1881. J. Wechselberg, clerk. Finches, Lynde & Miller, attorneys & counsellors, 1, 2, & 3 Library Building, Milwaukee.

24 December Term, 1880. State of Wisconsin, County Court of Milwaukee County.

EDWARD P. ALLIS
against
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brother.
} Jenkins, E. & W. Money demand.

December 9, 1880. And now comes the plaintiff in the above-entitled action, by Jenkins, Elliott & Winkler, his attorneys, and files his summons & complaint, with sheriff's certificate endorsed on the summons, as follows:

MILWAUKEE COUNTY, *ss:*

I certify that after using due diligence, search, and inquiry, I could not find the within-named defendants, Thomas J. Pope and James E. Pope, or either of them, in my county. I am informed, and believe the information to be true, that they, or either of them, are not residents of this State.

Milwaukee, December 9, 1880.

Fees, 1.00. PETER VAN VECHTEN, JR., *Sheriff.*

Same time affidavit and order of publication filed.

December 14, 1880. Affidavit, undertaking, and writ of attachment filed, with sheriff's return endorsed thereon and appraisal annexed thereto.

Jan. 8, 1881. Notice of appearance, &c., of def't, by Finches, Lynde & Miller. Petition for removal. Undertaking for removal, order to show cause, and admission of service filed.

Jan. 15, 1881. And now come the defendants, by Finches, Lynde & Miller, their attorneys, and upon the order to show
25 cause herein, move the court to change the place of trial of this action from the county court of Milwaukee county to the circuit court of the United States for the eastern district of Wisconsin. The plaintiff appeared by Jenkins, Elliott & Winkler, his attorneys, and not objecting thereto, said motion was granted, and the clerk of this court is hereby directed to transmit to the clerk of said court the papers and copy docket entries in this action.

Same time order for removal filed.

Statement of clerk's costs:

$ State tax p'd by pl'ff's attorneys	$1 00	
" Clerk's tax " " " "	2 00	
And costs on removal	$7 25	paid by def'ts' att'ys.

THE STATE OF WISCONSIN,
County Court, Milwaukee County, } *ss:*

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope and Brother, Defendants.

MILWAUKEE COUNTY, *ss:*

I, Julius Wechselberg, clerk of the county court in and for the

county of Milwaukee and State of Wisconsin, do hereby certify that I have compared the foregoing copies, and each and every one of them, with the originals, respectively; that they are, and each is, a true and correct transcript of the whole and every part of the original, respectively, now on file in my office, and that the said copies
26 comprise all the process, pleadings, and other papers and docket entries on file and of record in the above-entitled cause; and that such copies are herewith transmitted to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the order of the county court removing the above-entitled cause to said circuit court of the United States.

In testimony whereof, I have hereunto set my hand and the seal of said county court, at Milwaukee, this eighteenth day of January, A. D. 1881.

[SEAL.] JULIUS WECHSELBERG.
Clerk of the County Court of Mil. Co., Wis.

May 28, 1881. This day came the defendants, by their attorneys, and filed their answer, as follows:

Answer.

Circuit Court of the United States in and for the Eastern District of Wisconsin.

EDWARD P. ALLIS, Plaintiff,
vs.
THOMAS J. POPE and JAMES E. POPE, Copartners under the firm name of Thomas J. Pope & Brother, Defendants.

Said defendants, by Finches, Lynde & Miller, their attorneys, answer the complaint of the above-named plaintiff, and alleges as follows:

1st. The said defendants admit the allegations in the first clause or paragraph of said complaint contained relating to the co-partnership of defendants.

2d. The said defendants, further answering, deny the alle-
27 gations of said complaint commencing with the words "That on or about the 7th day of January, 1880," and ending with the words "at the rate of six per cent. per annum, for four months, on said price of the iron;" and they allege that these defendants, on or about the 7th day of January, 1880, agreed with the plaintiff to sell and deliver to him five hundred tons number one extra American iron, at and for the price of thirty-four dollars per ton, to be delivered to said plaintiff free to cars at the furnace bank, at Coplay, Lehigh county, Pennsylvania, to be paid for by plaintiff as the iron was delivered to cars at Coplay aforesaid by his promissory notes at four months, with interest added, at the rate of six per cent. per annum, the plaintiff also to pay the freight on said iron to Milwaukee. Defendants agreeing that the freight on said iron from the furnace bank to place of loading on boats, to be $1.00 per ton.

Defendants, further answering, say that there are many kinds,

varieties, and qualities of number one extra American pig iron, the same varying according to the makes of different manufacturers.

3rd. Defendants, further answering, deny the allegations of said complaint, commencing with the words "That pursuant to said agreement," and ending with the words "to place of loading or shipment." But they admit that said plaintiff paid for said iron and the freight thereon from the furnace bank to place of loading before the same arrived at Milwaukee, by giving his promissory note at four months, with six per cent. interest added therefor.

4th. Defendants, further answering, deny that plaintiff paid
28 any freight on said iron before the delivery of said iron to him, or before he had an opportunity to see or inspect the same.

5th. Defendants, further answering, deny that they have any knowledge or information sufficient to form a belief as to whether plaintiff was obliged to pay, and did pay, the sum of seventeen hundred and fifty dollars or any sum for freight on said iron.

6th. Defendants, further answering, admit that the said iron was delivered to said plaintiff, and they deny that they have any knowledge or information sufficient to form a belief as to whether or not said iron arrived at Milwaukee on or about July 15th, 1880, or that plaintiff inspected the same,.

7th. Defendants, further answering, deny the allegations of said complaint, commencing with the words "and found that the iron," and ending with the words, "and hath not accepted the same."

8th. Defendants, further answering, deny that they have any knowledge or information sufficient to form a belief as to the allegations of said complaint commencing with the words "but deposited the same" and ending with the words "two hundred and fifty dollars."

9th. Defendants, further answering, admit that they have not taken away said iron.

10th. Defendants, further answering, allege, that all the acts of plaintiff in depositing said iron on his premises were on
29 his own account and at his suggestion and without the sanction or approval of defendants, and without adequate or proper cause, and said defendants at no time have recognized or admitted said acts of plaintiff as right or proper, but, on the contrary thereof, have at all times expressly repudiated the same, and each of them, as not binding upon the defendants.

11th. Defendants, further answering, deny that they have any knowledge or information sufficient to form a belief as to the allegation of said complaint commencing with the words "but the same still remains" and ending with the words "one hundred and eighty-four dollars."

12th. The said defendants, further answering, deny the allegations of said complaint commencing with the words "that said defendants have in no way complied with" and ending with the words "but greatly inferior thereto."

13th. The said defendants, further answering, deny that they have any knowledge or information sufficient to form a belief as to whether

said plaintiff accepted said iron; but admit that he has said he would not. Defendants also admit that they have not repaid to plaintiff the sum of money paid them, and the freights and expenses paid by plaintiff on account of said iron.

14th. Defendants, further answering, deny the allegations of said complaint commencing with the words "and said defendants are now indebted" and ending with the words "from July 15, 1880."

Second. Said defendants, for a further, other, separate, and additional answer and defense to said complaint, allege—

30 15th. That heretofore, to wit, on or about the 7th day of January, 1880, said defendants agreed to sell and deliver to plaintiff, at the furnace bank at Coplay, Lehigh county, Pennsyvania, free to the cars, between the 8th day of January, 1880, and the 30th day of April, 1880, five hundred tons number one extra American iron, at and for the agreed price of thirty-four dollars a ton, and for which plaintiff agreed to pay, on delivery of said iron to cars at furnace bank at Coplay aforesaid, by giving his promissory notes therefor at four months, with interest added at the rate of six per cent., and to pay the sum of one dollar per ton freight on said iron from the furnace bank to place of loading on board boat; that the time of the delivery [of] said iron was changed, at the request of said plaintiff, until "as early in the spring as consistent with cheap freight."

16th. Defendants, further answering, say that subsequently, and in pursuance of said contract, they delivered to said plaintiff, on board the cars at the furnace bank at Coplay aforesaid, (500) five hundred tons of pig-iron.

17th. Said defendants, further answering, allege that, as they are informed and believe, said iron so delivered to said plaintiff as aforesaid was number one extra American iron, and was of the kind and quality required by said contract.

18th. Said defendants, further answering, allege that, as they are informed and believe, said iron was justly and fairly worth, at the time of the sale thereof to said plaintiff, the sum of thirty-four dollars per ton.

31 19th. Said defendants, further answering, allege that they fully performed each and all of the covenants and conditions of said contract on their part to be kept and performed, and they say that said plaintiff paid for and received said iron, and they deny that plaintiff is entitled to the return of the money so paid by him therefor.

Third. For a further other separate and additional answer and defense to said complaint, and by way of counter-claim said defendants allege—

20th. That on or about the 15th day of January, 1880, these defendants sold to the above-named plaintiff (500) five hundred tons of English pig-iron, at and for the agreed price of ($31.00) thirty-one dollars per ton. That said iron was to be delivered to plaintiff at New York. That said iron was for shipment, to be due here in April or May, 1880. That said plaintiff promised and agreed to pay for said iron the sum of thirty-one dollars per ton, amounting

in all to the sum of fifteen thousand five hundred dollars, on delivery of said iron at New York.

21st. That said iron was duly imported, and the five hundred tons of English pig-iron was ready for delivery in said month of May, 1880, of which plaintiff was duly notified, and these defendants duly tendered and offered to deliver said iron to said plaintiff and demanded payment therefor.

22nd. That said plaintiff, though often requested to receive and pay for said iron, neglected and refused to receive said iron or to pay for the same.

32 23rd. That thereupon these defendants gave notice to plaintiff that they should sell said iron for his account and risk.

24th. That said plaintiff still neglected and refused to receive and pay for said iron or any part thereof.

25th. That said plaintiff still persisting in his refusal, these defendants thereafter did sell said five hundred tons of English pig-iron for $20.00 per ton.

26th. That the said price for which said iron was so sold was the full market value of such iron and all that the same was worth, and the same was sold for the best price that could be obtained therefor.

27th. That the whole amount which said plaintiff agreed to pay for said five hundred tons of English pig-iron is $15,500. That the whole proceeds of the resale of said iron by these defendants, as aforesaid, is ten thousand dollars.

28th. That there was an overcharge of freight on the said five hundred tons of number one extra American iron from the furnace bank to the boat of $189, with which sum the plaintiff is entitled to be credited.

29th. That the difference between the amount which said plaintiff agreed to pay for said English pig-iron, and the amount for which the same was so resold, is five thousand five hundred dollars, which remains wholly unpaid.

30th. That there is now justly due and owing to these defend-
33 ants from said plaintiff, after deducting said sum of $189 over payment of freight by plaintiff as aforesaid, the sum of five thousand three hundred and eleven dollars, with interest thereon at the rate of seven per centum per annum from the 21st day of May, A. D. 1880.

Wherefore the defendants demand judgment that said complaint be dismissed, and that they have judgment against said plaintiff for the sum of five thousand three hundred and eleven dollars, with interest thereon from the 21st day of May, 1881, and costs of defendants.

FINCHES, LYNDE & MILLER,
Att'ys for Defendants.

STATE OF NEW YORK, }
City and County of New York; } ss.:

James E. Pope, being first duly sworn, on oath says: That he is one of the above-named defendants, that he has read the foregoing

answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JAMES E. POPE.

Subscribed and sworn to before me, this 21st day of May, 1881.

[SEAL.] WM. M. BRUCE,
Notary Public, N. Y. Co.

Hearing of Petition for Order of Sale.

June 27, 1881. This day came the plaintiff, by his counsel, and presented to the court his petition as herein filed, praying an order for the sale of the iron attached in this cause. And said petition being argued by Mr. Winkler for the plaintiff, and by Mr. Finch for the defendants, and submitted, the court held the same under advisement.

Order of Sale.

July 1, 1881. This day came the parties, by their counsel,
34 and on consideration of the petition of the plaintiff, herein filed, it is ordered by the court that the marshal of this district sell the iron attached in the above-entitled cause at public auction, that he give the same notice of sale as required in case of sale of personal property on execution, and that he hold the money realized from such sale in lieu of the property sold. This order is made without prejudice to any rights of the defendants on the merits, it not being intended by this order to adjudicate the ultimate rights and claims of the parties touching the subject-matter of the action.

July 6, 1881. This day, came the plaintiff, by his attorneys, and filed interrogatories to be annexed to a commission to issue to R. C. Hamersly, Esq., of Catasauqua, Pennsylvania, to take the depositions of James Thomas and V. W. Weaver on the part of the plaintiff.

July 15, 1881. This day, came the defendants, by their attorneys, and filed cross-interrogatories to be annexed to the commission to take the testimony of James Thomas and V. W. Weaver.

And, same day, came plaintiff, by his attorneys, and filed objections to the second, fifth, and sixth cross-interrogatories.

And, same day, commissioned issued.

Return to Order of Sale.

Certified copy order of sale returned: "In obedience to the within order, and after having given sufficient notice of the time and place
of sale, as therein commanded, I did, on the 9th day of Au-
35 gust, 1881, sell to E. P. Allis & Co. 494$\frac{793}{2240}$ tons of anthracite pig-iron (that being the iron mentioned in the within order) at $22.50 per gross ton of 2,240 lbs., making the total sum of $11,133.01, which sum, is now in my hands subject to the further orders of the court.

"HENRY FINK,
"Fees, $40.82. *U. S. Marshal.*"

August 18, 1881. Depositions received from R. C. Hamersly, Esq., Catasauqua, Pa., and filed.

September 9, 1881. It appearing to the satisfaction of the judge of this court that the notice to take the depositions of witnesses on behalf of the defendants in this cause, at Catasauqua, Lehigh county, Pennsylvania, on the 13th day of September, at 10 o'clock a. m., is not a reasonable notice in point of time, the same having been served on the 8th instant, and the engagements of counsel for the plaintiff being such that they cannot attend the taking of said depositions on the 13th inst., as appears by affidavit of F. C. Winkler, on file: It is ordered that the defendants refrain from taking said depositions on the day named, and that the taking thereof be postponed until Friday, the 16th day of September, 1881, at 10 o'clock a. m., before the officer named in said notice; Provided, however, That in case counsel for defendants shall prefer to take said depositions in Catasauqua after the taking of depositions of witnesses in New York, and shall give to the attorneys for plaintiff notice of such preference on or before the 14th instant, then said depositions of witnesses at Catasauqua may be taken on a day immediately after the completion of depositions which are to be taken in said cause in New York on the 20th instant, on notifica-
36 tion to be then given to the attorney of the plaintiff who may be present at the taking of the New York depositions.

CHAS. E. DYER, *Judge.*

September 23, 1881. Depositions on behalf of defendant received from post office and filed.

September 30, 1881. Depositions on behalf of defendant received from post office and filed.

October 3, 1881. This day came the plaintiff, by his attorneys, and filed his reply, as follows:

Reply of Plaintiff to Defendants Counter-Claim.

Circuit Court of the United States, Eastern Dist. of Wisconsin.

EDWARD P. ALLIS *ag'st* THOMAS J. POPE & another.

And now comes the plaintiff and, replying to the counter-claim in the defendants answer stated in the above entitled action, admits that the plaintiff contracted with the defendants for the purchase of five hundred tons of English pig iron at the price of thirty-one dollars per ton as in said counter-claim stated; and further replying says that he has no knowledge nor information sufficient to form a belief whether such iron was imported or was ready for delivery as in said counter-claim alleged or not; he admits that said defendants did offer to deliver certain iron pursuant to such contract, but whether or not the same was in fact ready for delivery or whether the same was the kind of iron this plaintiff was entitled to receive under such contract this plaintiff has no knowledge nor information sufficient to form a belief; and this plaintiff, further replying,
37 says that whether not said defendants sold said iron, or whether or not they sold the same at the price in said coun-

ter-claim alleged, or whether or not such alleged price was the full market value of said iron, this plaintiff does not know nor have information *of* sufficient to form a belief. And this plaintiff has no knowledge nor information sufficient to form a belief as to whether or not the difference between the amount which this plaintiff agreed to pay for such iron and the amount it was sold for by the defendants was as in the said counter-claim alleged.

JENKINS, ELLIOTT & WINKLER,
Pl'ff's Att'ys.

EASTERN DIST. OF WISCONSIN, *ss:*

Edward P. Allis, being duly sworn, says: He is the plaintiff named in the foregoing reply; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to these he believes it to be true.

E'W'D P. ALLIS.

Subscribed & sworn to before me, this 17th day of June, 1881.
A. G. MILLER,
Notary Public, Mil. Co., Wis.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Milwaukee, on the first Monday (being the third day) of October, A. D. 1881, present, the Honorable Charles E. Dyer, district judge, presiding, and on the forty-eighth day thereof, to wit, on the fifth day of December, A. D. 1881, the following proceedings were had, to wit:

Trial.

EDWARD P. ALLIS
vs.
38 THOMAS J. POPE & JAMES E. POPE. } At Law.

This day came the parties, by their counsel, Mr. T. C. Winkler appearing for the plaintiff, and Mr. H. M. Finch for the defendants, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, J. H. Crampton, George Perkins, John James, George W. Swift, Gilbert Dopp, David R. Brewer, John Saveland, William Peterman, John H. Booth, Cooledge Eastman, Hiram Bender, and Thomas P. Collingbourne, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled; and the trial not being concluded, the same was adjourned until to-morrow morning.

DECEMBER 6, 1881.

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fifteenth day of said term, to wit, on the seventh day of December, A. D. 1881, the following proceedings were had, to wit:

Verdict.

This day came the parties, by their counsel, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid being charged by the court, retired to their room under the charge of a sworn officer to deliberate upon their verdict; and afterwards
39 the said jurors of the jury came into court, and on their said oaths respectively do say that they find the issue herein in favor of the plaintiff, and assess the damages to the said plaintiff at the sum of sixteen thousand five hundred and thirteen dollars and eleven cents; and came the defendants, by their counsel, and moved the court for a new trial for reasons filed, as follows:

Motion for New Trial.

United States Circuit Court, Eastern District of Wisconsin.

EDWARD P. ALLIS *vs.* THOMAS J. POPE *et al.*

And now comes the said defendants, by Finches, Lynde & Miller, their att'ys, and move the court to set aside the verdict of the jury in this cause, and for a new trial, for the reason that the said verdict is contrary to the law and against the evidence.

December 7th, 1881.

FINCHES, LYNDE & MILLER,
Def'ts' Att'ys.

DECEMBER 31, 1881.

This day came the defendants, by their counsel; and on their motion it is ordered by the court that the hearing of the motion for a new trial be, and hereby is, continued.

FEBRUARY 6, 1882.

This day came the parties, by their counsel, and the motion of the defendants for a new trial came on to be heard, and was argued by Mr. Finch for said defendants, and by Mr. Winkler for the plaintiff; and the hearing being concluded, the court held the same under consideration.

40 *Order Overruling Motion for a New Trial.*

FEBRUARY 13, 1882.

This day came the parties, by their counsel, and, upon consideration of the defendants' motion for a new trial, and the arguments of counsel thereon, it is ordered by the court that said motion be, and hereby is, overruled.

And now, at this same term, to wit, January term, A. D. 1882, and on the seventy-eighth day thereof, to wit, on the fifteenth day of May, A. D. 1882, the following proceedings were had, to wit:

Judgment.

EDWARD P. ALLIS
vs.
THOMAS J. POPE & JAMES E. POPE. } At Law.

This day came the plaintiff, by his counsel, and on his motion it is considered and adjudged by this court, now here, that the said plaintiff do have and recover of the defendants, Thomas J. Pope and James E. Pope, the sum of sixteen thousand five hundred and thirteen dollars and eleven cents, damages so as aforesaid assessed by the jury, together with nine hundred and ninety-four dollars and eighty-five cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment-roll filed May 15th, A. D. 1882.

EDWARD KURTZ, *Clerk.*

Damages	$16,513 11
Costs	994 85
	$17,507 96

And same day bill of exceptions filed, as follows:

41 *Bill of Exceptions.*

United States Circuit Court, Eastern District of Wisconsin.

EDWARD P. ALLIS *vs.* THOMAS J. POPE and JAMES E. POPE.

Be it remembered that heretofore, to wit, on the fifth day of December, A. D. 1881, at the United States court-room in the city of Milwaukee, and State of Wisconsin, before the honorable Charles E. Dyer, district judge of the United States in and for the eastern district of Wisconsin, holding a term of the circuit court of the United States for the eastern district of Wisconsin, came as well the said plaintiff, by F. C. Winkler, Esq., his attorney, and the said defendants, by H. M. Finch, Esq., their attorney, and the said cause being reached for trial, and the respective parties, by their respective counsel, having announced themselves ready to proceed with the trial of the above-entitled cause, a jury of twelve good and lawful men were called, sworn, and duly empanneled, and thereupon the said plaintiff, to maintain the issue on his part, offered to introduce and read in evidence a letter from defendants to plaintiff, dated January 7th, 1880, to the introduction and reading of which said letter in evidence said defendants did then and there object, for the reason that said letter neither proves nor tends to prove the contract, as stated and set forth in said plaintiff's complaint, which said objection was then and there argued by the counsel for the respective parties, and said judge did then and there declare his opinion to be that said letter was competent evidence, and did overrule said objec-
42 tion, and to which said ruling and decision said defendants,

by their counsel, did then and there except. And thereupon said letter was introduced and read in evidence as follows, to wit:

NEW YORK CITY, *January* 7, 1880.

Messrs. E. P. ALLIS & Co., *Milwaukee, Wis.*

DEAR SIRS: We wired you to-day that we accepted your offer, 500 tons No. 1 ex., on furnace bank, $34; 300 tons No. 1 ex., Glengarnock, of $31½, on yard here, at storage, 8c. per ton per month.

The iron to be met with your notes bearing interest at 6 per cent. per annum, and at 4 mos. from this date. The iron to be paid by & for the bank at shipping date, and to be held as collateral till the iron be so shipped.

Yours, truly, THOS. J. POPE & BRO.

Please send to us the bank's agreement to do this, and we will at once send to you invoices. The iron to be taken on opening canals in May.

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence a letter from plaintiff to defendants, dated January 10, 1880, to the introduction and reading of which said letter said defendants did then and there object, for the same reasons hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence as follows, to wit:

"MILWAUKEE, *Jan'y* 10, 1880.

43 "THOS. J. POPE & BRO,
"292 *Pearl St., N. Y.*

GENTLEMEN: Yours of 7th rec'd, and we hereby confirm the contract for 500 tons No. 1 ex. at 34, & 300 tons No. 1 ex. Glengarnock at 31½, on 4 months' time, at 6 per cent. per annum, the 300 tons being subject to a storage charge of 8c. pr. ton per month. Shipment to be made as early in the spring as consistent with cheap freights to the National Exchange Bank of Milwaukee, who will pay on receipt of bills of lading as stated below. Upon receipt from you of notes and necessary papers confirmatory of above we will execute and return them.

"EWD. P. ALLIS & CO.

"500 Ex., $17,000, 5 notes, 4 mos., int. 6 per cent., Jan. 10.
"300 G., 9,450, 3 mos., int. —, Jan. 10, own order."

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence the agreement of the Milwaukee National Exchange Bank, dated January 10, 1880, to the introduction and reading of which said agreement said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which

ruling and decision said defendants did then and there except. And thereupon said agreement was read in evidence as follows, to wit:

"I hereby agree to receive from Thos. J. Pope & Bro., of New York, eight hundred tons of pig-iron, and pay for the same on receipt of bills of lading for the iron consigned to the National Ex-
44 change Bank of Milwaukee, on the following terms, as per letter of Thos. J. Pope & Bro. to E. P. Allis & Co., Jan. 7, 1880, say (500 tons) five hundred tons No. 1 ex. furnace @ $34 per ton; (300 tons) three hundred tons No. 1 Glengarnock @ $31.50 per ton. Bills of lading to be sent direct to the bank, and payment to be made promptly on receipt of same. Iron to be shipped early in May, 1880, on the opening of the canal.

"W. G. FITCH,
"*Cashier National Exchange Bank of Milwaukee.*
"Milwaukee, Jan. 10, 1880."

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence a letter from defendants to plaintiff, dated April 21, 1880, to the introduction and reading of which said letter said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence, as follows, to wit:

"NEW YORK CITY, *April* 21, 1880.

"Messrs. E. P. ALLIS & Co., *Milwaukee, Wis.*

"GENTLEMEN: Your 500 tons 1 x American pig-iron are now ready for shipment. We are looking for vesssels by which to ship to Milwaukee.

"Yours, truly, "THOS. J. POPE & BRO."

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence a letter from defendants to plaintiff, dated May 1st, 1880, to the introduction and reading of which
45 said letter said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence, as follows, to wit:

"Messrs. E. P. ALLIS & Co., *Milwaukee, Wis.*

"GENTLEMEN: As per agreement with you and the National Exchange Bank of Milwaukee, we have shipped on account of said agreement three hundred (300) tons pig-iron, and have sent the *the* National Exchange Bank of Milwaukee invoice & bills of lading for same. Also your acceptance for $10,729.96, which, when paid, will leave a balance in your favor on this shipment of $25.96, which we will credit on next shipment, which will soon follow.

"Yours, truly, THO. J. POPE & BRO."

And said plaintiff to further maintain the issue on his part, offered to introduce and read in evidence a statement and invoice of defendants to National Exchange Bank of Milwaukee, dated May 1st, 1880, to the introduction and reading of which said statement said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence, as follows, to wit:

"*Statement.*

"292 PEARL ST., NEW YORK, *May 1st*, 1881.

46 "The National Exchange Bank of Milwaukee, Wis., to Thos. J. Pope & Bro., Dr.

"300 tons pig-iron and interest, as per invoice herewith		$10,704 00
"Acceptances due May 3, payable herewith by Nat'l Exch. Bank	$5,364 98	
"Acceptance due May 6, payable herewith by Nat'l Exch. Bank	5,364 98	
		10,729 96
"By balance		25 96"

And invoice, as follows:

"NEW YORK, 30 *Ap'l*, 1880.

"The National Exchange Bank of Milwaukee, Wis., to Messrs. J. Pope & Bro., Dr.

"300 tons No. 1 ex. American pig-iron, $34	10,200
"Freight from furnace to Elizabethport, $1	300
"Four mos., interest on $10,200	204
	10,704"

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence a letter from defendants to W. C. Fitch, Esq., cashier of the National Exchange Bank of Milwaukee, dated May 1st, 1880, to the introduction and reading of which said letter said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence, as follows, to wit:

"NEW YORK, *May 1st*, 1880.

"W. C. FITCH, Esq.,

47 "*The National Exchange Bank of Milwaukee, Wis.*

"DEAR SIR: As per agreement with Messrs. E. P. Allis & Co., dated Jan'y 7th, 1880, and yourself, dated Jan'y 10, 1880, we have shipped on account of same three hundred (300) tons, and have for-

warded to you through Market National Bank invoice and bills lading for same and acceptances for $10,729.96, which, when paid, will leave a balance in your favor on this shipment of $25.96, for which we will give you credit on next shipment, which will soon follow.

"Enclosed please find statement and invoice.

"Yours truly, THOS. J. POPE & BRO."

And said plaintiff, to further maintain the issue on his part, offered to introduce and read in evidence a letter from plaintiff to defendants, dated January 22, 1880; to the introduction and reading of which said letter said defendants did then and there object, for the same reason hereinbefore stated, which said objection the said judge then and there overruled, and to which ruling and decision said defendants did then and there except. And thereupon said letter was read in evidence as follows, to wit:

"MILWAUKEE, *Jan'y* 22, 1880.

"THOS. J. POPE & BRO., 292 *Pearl St., New York.*

"GENTLEMEN: Enclosed we hand you acceptances:

	Dec'r 31.	4 mo.		5,364 98
	Jan'ry 3.	4 "		5,364 98
	" 6.	4 "		5,519 09
	" 9.	4 "		5,364 97
48	" 12.	4 "		5,364 98
			Total	26,979

To pay for 500 tons No. 1 ex. Copley pig iron, deliverable free on cars at furnace (ft. to New York not to exceed $1 per ton), at $34 per ton, and 300 tons No. 1 Glengarnock pig-iron, at 31½ per ton in York, subject to 8c. per ton per month storage to be paid by us, said 800 tons of pig-iron to be ship'd to the National Exchange Bank of Milwaukee. It is upon the opening of the canals in May, or as soon as consistent with cheap freights, who will pay the amount of said acceptances upon their receipt with the B | L attached.

Yours, &c., EWD. P. ALLIS & CO.

And said plaintiff, to further maintain the issue on his part, introduced and read in evidence five acceptances, dated December 31st, 1879, Jan'y 3d, 1880, Jan'y 6th, 1880, Jan'y 9th, 1880, and Jan'y 12th, 1880, respectively, and a draft dated May 13th, 1880, drawn by the said defendants on the said plaintiff, and amounting in the aggregate to $27,479.00, which it was admitted was paid by plaintiff to defendant- for 500 tons of American iron and 300 tons of Scotch iron, mentioned in said letters between May 3rd and 17th, 1880.

And said plaintiff, to further maintain the issue on his part, called Charles Allis, who, being sworn, testified that he was a son of the said plaintiff and had charge of said plaintiff's foundry, and that

said plaintiff had no partners; that he remembered and had
49 charge of the unloading of two cargoes of iron received in 1880 by the plaintiff from Thomas J. Pope & Brother. It came in lake vessels; he thought propellers. There were two kinds of iron. About 300 tons of Scotch iron and 500 tons of American iron, all mixed up in the vessels. After it was unloaded I had to take a gang of men to separate and pile it. The Scotch iron was all branded and the pig was different, so as to present no difficulty in distinguishing it from the American. We put the Scotch iron and the American iron in separate piles. The Scotch iron was used. The American iron was put in ten-ton piles in an inclosure inside our inclosed dock; two and a half piles of it were outside the inclosure. It was the latter part of July, 1880, when we had it completely assorted and piled. The American iron was not used, but remained where I piled it until it was sold by the marshal. I pointed out that iron to John H. Kremer, William B. Parks, J. A. Starke, and James Sheriffs, who examined and tested it. I also pointed it out to two or three parties who came from the East and examined it; two of them were Mr. Weaver and Mr. Thomas. There was no other iron there when any of these parties examined it. I understand the testing of pig iron and judging the grade of it. I tested and examined this American iron.

And said plaintiff, to further maintain the issue on his part, propounded to said witness, Charles Allis, the following question: "Question. Of what grade was this American iron?" To which
50 said question and to the answering thereof said defendants did then and there object, on the ground that there was no evidence that the iron received at Milwaukee was the same as the iron delivered on the furnace bank; and said judge did then and there overrule said objection; to which said ruling the defendants, by their counsel, did then and there except; and thereupon said witness, Charles Allis, did answer said question as follows, to wit: "It was a mixed up lot of iron; some of it would grade as No. 1, some as No. 2, and some as No. 3. In my judgment it would not average more than about a No. 2, three grades below No. 1 extra."

And said plaintiff, to further maintain the issue on his part, called J. H. Kremer, who, being sworn, testified that he resided in Milwaukee; was a blast furnace man and well acquainted with the different grades of American iron; that No. 1 extra American iron was a well known grade of iron; that he examined a lot of iron pointed out to him by Mr. Charles Allis.

And said plaintiff, to further maintain the issue on his part, offered to propound to said witness, J. H. Kremer, the following question, to wit:

Q. What was the grade of the iron so examined by you? To which said question and the answering thereof said defendants did then and there object, for the same reason that the quality of a lot of iron delivered from lake vessels to said plaintiff in Milwaukee was irrelevant, incompetent, and immaterial until it is shown, or pro-
51 posed to be shown, by competent evidence that the said iron delivered in Milwaukee to said plaintiff from lake vessels was

the same identical iron shipped, or agreed to be shipped, under the said contract, as read in evidence; which said objection was then and there argued by the counsel for the respective parties, and said judge did then and there declare his opinion to be that evidence as to the quality of said lot of iron so received in Milwaukee by said plaintiff was competent and relevant to the issue, and did overrule said objection; and to which said ruling and decision said defendants, by their counsel, did then and there except; and thereupon said witness, J. H. Kremer, did answer said question as follows, to wit:

"It was about 15 or 20 per cent. of No. 1, about 60 per cent. of No. 2, and about 20 per cent. of No. 3."

And said plaintiff, to further maintain the issue on his part, called W. B. Parkes who, being sworn, testified that he resided in Bay View; was superintendent of the iron works there, and had been for twelve years; that he knew the qualities and grades of American pig-iron; that he examined a lot of iron pointed out to him by Mr. Charles Allis.

And said plaintiff, to further maintain the issue on his part, offered to propound to said witness, W. B. Parkes, the following question, to wit:

Q. What was the grade of the iron so examined by you?

To which said question and the answering thereof said defendants did then and there object, for the reason that the quality of a
52 lot of iron delivered from lake vessels to said plaintiff in Milwaukee was irrelevant, incompetent, and immaterial, until it is shown, or proposed to be shown, by competent evidence that the said iron, delivered in Milwaukee to said plaintiff from lake vessels, was the same indentical iron shipped, or agreed to be shipped, under the said contract, as read in evidence; which said objection was then and there argued by the counsel for the respective parties, and said judge did then and there declare his opinion to be that evidence as to the quality of said lot of iron so received in Milwakee by said plaintiff was competent and relevant to the issue, and did overrule said objection; and to which said ruling and decision said defendants, by their counsel, did then and there except; and thereupon said witness, W. B. Parkes, did answer said question, as follows, to wit:

"It was part No. 1, part No. 2, and part No. 3. The largest proportion was No. 2."

And said plaintiff, to further maintain the issue on his part, called Joseph Starke, who, being sworn, testified that he resided at Bay View; was superintendent of the blast furnace at Bay View, and was well acquainted with the different grades of American iron; that he examined a lot of iron pointed out to him by Mr. Charles Allis.

And said plaintiff, to further maintain the issue on his part, offered to propound to said witness, Joseph Starke, the following question, to wit:

Q. What was the grade of the iron so examined by you?

53 To which said question and the answering thereof said defendants did then and there object, for the reason that the quality of a lot of iron, delivered from lake vessels to said plain-

tiff in Milwaukee, was irrelevant, incompetent, and immaterial, until it is shown, or proposed to be shown, by competent evidence, that the said iron delivered in Milwaukee to said plaintiff from lake vessels was the same identical iron shipped, or agreed to be shipped, under the said contract, as read in evidence; which said objection was then and there argued by the counsel for the respective parties, and the said judge did then and there declare his opinion to be that evidence as to the quality of said lot of iron so received in Milwaukee by said plaintiff was competent and relevant to the issue, and did overrule said objection; and to which said ruling and decision said defendants, by their counsel, did then and there except; and thereupon said witness, Joseph Starke, did answer said question, as follows, to wit:

"It was of different grades and qualities, some being No. 1, some No. 2, and some No. 3."

And said plaintiff, to further maintain the issue on his part, offered to call James Sheriffs, and to prove by him the quality of a lot of iron pointed out to him by Mr. Charles, Allis, and the said defendants, by their counsel, did then and there admit that they would call no witness to testify that the quality of said lot of iron received by said plaintiff from lake vessels was No. 1 extra American iron, and not an iron of inferior quality.

54 And said plaintiff, to further maintain the issue on his part, offered to prove by competent witnesses that he had paid out for freight of said 800 tons of iron to Buffalo—

June 12, 1880, for 400 tons	$1,000 00
June 18, 1880, for 400 tons	$1,000 00

Also that the assorting and piling of said American iron was reasonably worth $250.00.

And for lake freight from Buffalo to Milwaukee—

June 26, 1880	$400 00
July 7, 1880	$400 00

And the storage thereof, from the time of delivery at Milwaukee to the commencement of the action, $184.00.

All of which the defendants, by their counsel, then and there admitted.

And said plaintiff, to further maintain the issue on his part, produced and read in evidence the deposition of V. W. Weaver, which was in substance as follows:

"That his name was V. W. Weaver; that he resided in Coplay, Lehigh county, Penna.; and that he was superintendent of the Coplay Iron Company, and had been engaged in the manufacture of pig-iron for over twenty years; that he examined a lot of iron in Milwaukee, pointed out to him by Mr. Charles Allis."

And said plaintiff, to further maintain the issue on his part, offered to read in evidence the answers to the fourth and fifth interrogatories of said deposition of said Weaver, to which said

55 fourth and fifth interrogatories, and to the reading of the answers thereto, said defendants did then and there object, for

the reason that the quality of a lot of iron delivered from lake vessels to said plaintiff in Milwaukee was irrelevant, incompent, and immaterial, until it is shown, or proposed to be shown, by competent evidence that the said iron delivered in Milwaukee to said plaintiff from lake vessels was the same identical iron shipped, or agreed to be shipped, under said contract as read in evidence; which said objection was then and there overruled by said judge; and to which said ruling and decision said defendants, by their counsel, did then and there except; and thereupon said fourth and fifth interrogatories and the answers thereto were read in evidence, which were as follows, to wit:

"Fourth interrogatory. Please describe the character and quality of such iron.

"Answer. In breaking the iron I saw that some of it was No. 1 extra, and some of it was silver gray.

"Fifth interrogatory. Was the iron you so examined No. 1 extra American iron?

"Answer. Part of the iron examined was No. 1 extra American iron, and some of it was not No. 1."

And the remainder of said deposition was as follows, to wit:

"That he had been superintendent of the Coplay Iron Company for two years; that the iron manufactured by the Coplay Iron Company is not branded or marked; that he believes from the examination made of said lot of iron in Milwaukee, that three-fourths
56 of it was Coplay No. 1 iron, and the other quarter was not; that the Coplay Iron Company make five grades of iron A x, A, B x, C x, & C, and that No. 1 extra Coplay iron was No. 1 extra American."

And said plaintiff to further maintain the issue on his part, produced and read in evidence the deposition of James Thomas, which was in substance as follows, to wit: "That his name was James Thomas, and that he resided in Catasauqua, Lehigh county, Pennsylvania; that he was the proprietor of a foundry and machine works; that he had had charge of blast furnaces for twenty years; that he examined a lot of iron in Milwaukee, pointed out to him by Mr. Charles Allis."

And said plaintiff to further maintain the issue on his part offered to read in evidence the answers to the fourth and fifth interrogatories of said deposition of said James Thomas; to which said fourth and fifth interrogatories and to the reading of the answers thereto said defendants did then and there object, for the reason that the quality of a lot of iron delivered from lake vessels to said plaintiff in Milwaukee was irrelevant, incompetent, and immaterial, until it is shown, or proposed to be shown, by competent evidence that the said iron delivered in Milwaukee to said plaintiff from lake vessels was the same identical iron shipped, or agreed to be shipped, under said contract as read in evidence; which said objection was then and there overruled by said judge; and to which said ruling and
57 decision said defendants, by their counsel, did then and there except; and thereupon said fourth and fifth interrogatories

and the answers thereto were read in evidence, which were as follows, to wit:

"Fourth interrogatory. Please describe the character and quality of such iron.

"Answer. It was a mixed up lot of iron, made up of No. 1 with inferior grades.

"Fifth interrogatory. Was the iron you so examined No. 1 extra American iron?

"Answer. It contained some No. 1 iron that I thought was American."

And said plaintiff, to further maintain the issue on his part, produced and read further in evidence from the deposition of said James Thomas, which part read consisted of the cross-interrogatories and the answers thereto, and was in substance as follows, to wit:

"That he was not connected in any way with the Coplay Iron Company, but used iron very extensively in his foundry and machine works; that he does not know how the Coplay Iron Company grades its iron."

And said plaintiff, to further maintain the issue on his part, offered to produce the deposition of James E. Pope, and read in evidence the cross-examination; to which said defendants did then and there object, for the reason that it was irrelevant, incompetent, and immaterial to the issues of the suit at bar whether a suit was pending between the said defendants, Thos. J. Pope and James E. Pope as plaintiffs and "The Coplay Iron Company" as defendant, and because it appears affirmatively by the complaint in the suit of the said defendants as plaintiffs and The Coplay Iron Company
58 as defendant that the said defendants had never seen or examined the iron, and that all the allegations therein as to the quality of a certain lot of iron therein specified as purchased by the said defendants from the Coplay Iron Company are stated on information and belief, and are mere hearsay testimony; which said objection was then and there argued by the counsel for the respective parties, and the said judge did then and there declare his opinion to be that evidence as to the pendency of a suit between said defendants as plaintiffs and the Coplay Iron Company as defendant is relevant to the issue at bar, and that the complaint in the suit of the said defendants as plaintiffs and The Coplay Iron Company as defendant was competent evidence, and said judge did then and there overrule said objection; to which said ruling and decision the said defendants, by their counsel, did then and there except; and thereupon said plaintiff read said cross-examination of James E. Pope, and the said complaint verified by said James E. Pope as follows, to wit:

"That there is a suit pending between my firm as plaintiff and the Coplay Iron Company as defendant, relating to the American iron shipped to E. P. Allis & Co., and that the information upon which allegations were made in the complaint therein upon information and belief was derived from the said plaintiff, E. P. Allis, and in August or September, 1880, we sent a man, Wm. B. Brown-
59 ell, to Milwaukee to examine the iron shipped to Allis and

report to us its quality, and that the following is a copy of the verified complaint therein:

The Supreme Court.

THOMAS J. POPE and JAMES E. POPE
vs.
COPLEY IRON COMPANY, LIMITED,

Trial to be had in the city and county of New York.

The plaintiffs complain of the defendant, and say:

1. That said plaintiffs, at the dates hereinafter mentioned, were, and now are, copartners in trade and dealers in copper, pig-iron, and other metals, and carry on the said business in the city of New York.

2. That said defendant is a corporation duly incorporated and organized under the laws of the State of Pennsylvania.

3. That on or about the 8th day of December, 1879, said defendants sold to these plaintiffs, and they purchased of defendant, nine hundred tons of number one extra foundry pig-iron of the Copley Iron Company (Limited) make, at twenty-seven dollars per ton of 2,240 pounds, to be delivered on the cars at the furnaces of the said company, and paid pay for the same.

That said iron number one extra was and is a grade of pig-iron of certain well-known quality in the market; that these plaintiffs purchased said iron to sell again to their customers, to be used in their manufacturing business, all of which was well known to defendant; that said defendant sold and these plaintiffs purchased said iron as number one extra iron, and these plaintiffs allege that said defendant warranted said iron to be No. 1 extra
60 iron; that afterwards said defendant, in pursuance of said purchase and sale, delivered on board of cars nine hundred tons of what they claimed and pretended was number one extra iron, and delivered to these plaintiffs bills of lading, in which the same was described as No. 1 extra iron.

That relying upon said warranty agreement and bills of lading, these plaintiffs sold and forwarded to a customer in Milwaukee five hundred tons of said iron so delivered by said defendant at and for the agreed price of $34 per ton, and the freight thereon from defendant's furnace to Milwaukee; that they sold said iron to their said customer as number one extra iron; that these plaintiffs did not examine said iron, and had no opportunity to examine the same; that they relied upon said warranty of agreement and bills of lading, and forwarded five hundred tons of said iron to their said customers without examining the same.

7. These plaintiffs allege, on information and belief, that said iron delivered by said defendant aforesaid, in pursuance of their sale to these plaintiffs, was not number one extra, but iron of a quality greatly inferior thereto, and not of the standard or quality of number one extra iron, and wholly unsuitable for use in these plaintiffs' customer's business.

8. That their said customer refused to accept, and has not accepted, said iron, and it still remains subject to defendant's order, and these plaintiffs have not accepted the same.

61 That said defendant neglected and refused to deliver the iron so purchased of it and paid for as aforesaid, although often requested to do so, and have also refused to return the money so received by it from these plaintiffs or any part thereof.

That these plaintiffs have sustained damages by reason of the inferior quality of said iron, and the breach of defendant's agreement and warranty as to the quality thereof, and its refusal to deliver said iron so purchased of it as aforesaid, and of its refusal to return to the money so received from these plaintiffs to the amount of twenty thousand four hundred and three $\frac{6\,9}{1\,0\,0}$ dollars, and said defendant is justly indebted to the plaintiffs in that sum with interest thereon from the first day of November, 1880.

Wherefore these plaintiffs demand judgment against the defendant for said sum of twenty thousand four hundred and three $\frac{6\,9}{1\,0\,0}$ dollars and interest thereon from November 1st, 1880, or for such other or further order or relief as may be proper to grant and for their costs and disbursements in this action.

NILES & BAGLEY,
Plaintiffs Attorneys.

Office and post office address: No. 8 Wall street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

James E. Pope, being duly sworn, says: That he is one of the plaintiffs in the above-entitled action; that the foregoing complaint is true of his own knowledge except as to the matters which are

62 therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Signed) JAMES E. POPE.

Sworn to before me, this 8th day of January, 1881.

WM. M. BRUCE,
Notary Public, N. Y. Co.

And the said defendants after the reading of the said complaint did then and there, by their counsel, move the said court to strike out such portions of said complaint where the allegations therein are made on information and belief, for the reason that all allegations made upon information and belief are mere hearsay testimony, and because the information upon which said allegations are made upon was derived from said plaintiff, E. P. Allis, which said motion was then and there objected to by the said plaintiff, and the said judge did then refuse to order said allegations stricken out; to which ruling and decision the said defendants, by their counsel, did then and there except.

And thereupon the plaintiff rested, and the above and foregoing is all of the evidence offered and given in said trial by said plaintiff.

And thereupon said defendants to maintain the said issue on their

part produced and read in evidence the following letters and telegrams.

1st. Telegram of plaintiff to defendants, dated January 2nd, 1880, as follows, to wit:

"MILWAUKEE, WIS., *Jan.* 2, 1880.

To THOMAS J. POPE & BRO., 292 Pearl St.:

63 Quote five hundred American and three hundred Scotch spring delivery.

E. P. ALLIS & CO."

2nd. Telegram of plaintiff to defendants, dated January 2nd, 1880, as follows, to wit:

"MILWAUKEE, WIS., *Jan.* 2, 1880.

"To THOMAS J. POPE & BRO.

"Also quote railroad freights for February and March delivery.

"E. P. ALLIS & CO."

3rd. Letter of defendant to plaintiff, dated January 3rd, 1880, as follows, to wit:

"NEW YORK CITY, *Jan'y* 3, 1880.

"E. P. ALLIS & Co.

"GENTLEMEN: Your telegram of 2nd at hand. The present freights are 30 c. per 100 lbs. to Milwaukee, or $6.72 per ton. The roads will not give freights to last until February and March.

"THOS. J. POPE & BRO."

5th. Telegram of defendants to plaintiff, dated January 5th, 1880, as follows, to wit:

"NEW YORK CITY, *Jan'y* 5, 1880.

"To E. P. ALLIS & Co.

"As you state think we can sell five hundred to eight hundred tons at thirty-one and a half with interest added, if you wire immediately. Prices very excited.

"THOS. J. POPE & BRO."

6th. Telegram of plaintiff to defendants, dated January 5th, 1880:

"MILWAUKEE, *Jan.* 5, 1880.

"To THOS. J. POPE & BRO.

"GENTS.: Letter 2nd received; will take five to eight hundred tons present delivery price, and give four months' notes;

64 you hold iron collateral, and ship to bank, who will pay on shipment.

_____ _____."

7th. Telegram of plaintiff to defendants, dated January 5th, 1880:

"MILWAUKEE, *Jan.* 5, 1880.

"To THOMAS J. POPE & BRO.

"GENTS: Will take, say five hundred No. 1 American and three hundred Glengarnock at thirty-one fifty and interest, as per telegram.

"E. P. ALLIS & CO."

8th. Telegram of plaintiff to defendants, dated January 6th, 1880:

"MILWAUKEE, *Jan.* 6, 1880.

"To THOS. J. POPE & BRO.

"Despatch received all right. Send proper papers for execution.

"E. P. ALLIS & CO."

9th. Telegram of defendants to plaintiff, dated January 7th, 1880:

"NEW YORK CITY, *Jan'y* 7, 1880.

"To E. P. ALLIS & Co.

"GENTLEMEN: Will sell five hundred tons American No. 1 as you propose, and three hundred Glengarnock as proposed.

"THOS. J. POPE & BRO."

10th. Telegram of plaintiff to defendants, dated January 7th, 1880, as follows, to wit:

"MILWAUKEE, *Jan.* 7, 1880.

"To THOMAS J. POPE & BRO.

"Telegraph immediately state of our iron transaction with
65 full particulars and general state of market.

"E. P. ALLIS & CO."

11th. Telegram of defendants to plaintiff, dated January 7, 1880, as follows, to wit:

"NEW YORK, *Jan'y* 7, 1880.

"To E. P. ALLIS & Co.

"GENTLEMEN: Iron waiting execution bank agreement on your notes, &c. Market here rising, excited, and strong, with prospects agreed upon by all the bests judges of great scarcity. European markets equally excited and strong. Five hundred tons English iron in yard here, at thirty dollars.

"THOS. J. POPE & BRO."

12th. Telegram of plaintiff to defendants, dated January 7th, 1880, as follows, to wit:

"MILWAUKEE, *Jan.* 7, 1880.

"To THOS. J. POPE & BRO.

"GENTS: All right. Send us notes for execution, and copy or description on paper you are to give us.

"E. P. ALLIS & CO."

13th. Letter of plaintiff to defendants, dated January 7th, 1880, as follows, to wit:

"MILWAUKEE, *Jan.* 7, 1880.

"To THOS. J. POPE & BRO.

"GENTS: We despatched you this a. m. and have your reply saying iron wanted, execution of the notes, &c. We suppose you have forwarded the papers, and we will execute and return them at once on receipt. Please keep us advised of the market and of any specially good bargain that may be offered.

"E. P. ALLIS & CO."

14th. Letter of defendants to plaintiff, dated January 7th, 1880, as follows, to wit:

66 "NEW YORK, *Jan'y* 7, 1880.

"To E. P. ALLIS & Co.:

"We wired you to-day that we accepted your offer: 500 tons No. 1 ex. on furnace bank, $24; 300 tons No. 1 ex. Glengarnock, at 31½, in yard here; storage, 8c. per ton per month. The iron to be met with your notes bearing interest at 6 per cent. per annum, and at 4 months from this date. The iron to be paid for by the bank at shipping date, and to be held as collateral till the iron be so shipped. Please send to us the bank's agreement to do this, and we will at once send to you the invoices. The iron to be taken on opening canals in May.

"THOS. J. POPE & BRO."

15th. Letter of defendants to plaintiff, dated January 8th, 1880 as follows, to wit:

"NEW YORK, *Jan.* 8, 1880.

"To E. P. ALLIS & Co.:

"The storage receipt will read for the Glengarnock, as on the paper herewith; will be held here subject to the conditions of your notes as stated therein. The No. 1 Extra Lehigh we will give you an agreement to deliver the iron free to cars at the furnace bank at Coplay, Lehigh co., Penna., between now and April 30th, at $34. Your notes to be regular four months' notes (adding interest) to the order of the cashier of the bank, who shall agree to pay them as the iron is delivered to cars at Coplay for the No. 1 Ex. Am., or to the boat at New York for the Glengarnock iron. This please attend
67 to by the return mail, and oblige, yours, &c.

"THOS. J. POPE & BRO."

16th. Letter of plaintiff to defendant, with bank guarantee, both dated January 10th, 1880, as follows, to wit:

"MILWAUKEE, *Jan.* 10, 1880.

"To THOMAS J. POPE & BRO.:

"Yours of 7th received, and we hereby confirm the contract for 500 tons No. 1 Ex. at 34, and 300 tons No. 1 Ex. Glengarnock at

31½ on four months' time, at 6 per cent. annum, the 300 tons being subject to a storage charge of 8c. per ton per month. Shipment to be made as early in the spring as consistent with cheap freight to the National Exchange Bank of Milwaukee, who will pay on receipt of B. L., as stated below upon receipt from you of notes and necessary papers confirmatory of above; we will execute and return them.

"E. P. ALLIS & CO."

"I hereby agree to receive from Thos. J. Pope & Bro., of New York, eight hundred tons of pig iron, and pay for the same on receipt of bills of lading for the iron consigned to The National Exchange Bank of Milwaukee, on the following terms, as per letter of Thos. J. Pope & Bro. to E. P. Allis & Co., Jan'y 7, 1880, say:

"500 tons (five hundred tons) No. 1 Ex. furnace @ $34 per ton; 300 tons (three hundred tons) No. 1, Glengarnock @ $31.50 per ton. Bills of lading to be sent direct to the bank and payments to be made promptly on receipt of same. Iron to be shipped early in May, 1880, on the opening of the canal.

"W. G. FITCH,
"*Cashier National Exchange Bank of Milwaukee.*

"January 10, 1880."

68 29th. Letter of plaintiff to defendants, dated January 22d, 1880, as follows, to wit:

"MILWAUKEE, *Jan.* 22, 1880.

"To THOMAS J. POPE & BRO.:

Enclosed we hand you acceptances:

Dec'r 31. 4 mos.	----------	5,364 98
Jan'ry 3. 4 "	----------	5,364 98
" 6. 4 "	----------	5,519 09
" 9. 4 "	----------	5,364 97
" 12. 4 "	----------	5,364 98
Total	----------	26,979 00

"To pay for 500 tons No. 1 Ex. Coplay pig iron, deliverable free on cars at furnace (f't to New York not to exceed $1 per ton) at $34 per ton, and 300 tons No. 1 Glengarnock pig iron at 31½ per ton in yard, subject to 8 c. per ton per month storage to be paid by us, said 800 tons of pig-iron to be shipped to the National Exchange Bank of Milwaukee. It is upon the opening of the canals in May or as soon as consistent with cheap freights, who will pay the amount of said acceptances upon their receipt with the B. L. attached.

"E. P. ALLIS & CO."

31st. Letter of Fitch, cashier of National Exchange Bank of Milwaukee, to the defendants, dated Feb. 3, 1880, as follows, to wit:

"MILWAUKEE, *Feb.* 3, 1880.

"To THOS. J. POPE & BRO.:

"I have your letter of the 26th ult. I have arranged with

Messrs. E. P. Allis & Co. to advance them the am't of invoice of 800 tons of pig-iron, purchased of you, as per your letter of the 7th Jan'ry, 1880, and their acceptance of same, Jan. 10, 1880, I to pay you, as per my agreement of Jan. 10, 1880, for 500 tons at the rate of $34 per ton, and for 300 tons at the rate of $31.50 per ton, and in addition to this interest at six per cent. per annum for four months on the amount of the invoices. This item of interest should have been made a part of my agreement to take the 800 tons of pig-iron from you, under date Jan. 10, 1880, and I now amend that agreement to that effect. I shall want my title to the iron to come direct from you, and also the surrender of E. P. Allis & Co.['s] acceptances given for the iron, when I pay the amount of purchase-money for the 800 tons of iron, as above or *pro rata*. This is my understanding of the matter, and my agreement of Jan. 10, 1880, with the addition of the 4 months' interest, will be carried out.

"W. G. FITCH, *Cashier*."

34th. Letter of plaintiff to defendants, dated April 6, 1880, as follows, to wit:

"MILWAUKEE, *Apr.* 6, 1880.

"To THOMAS J. POPE & BRO.:

"We leave it to you to get freight contracts on the iron. It must not be hurried off on first opening at high freights. We understand they are asking $4.50 by early boats, while it came at less than $3 last fall. We doubt not you can arrange to ship gradually. If we correctly understand, the 500 tons American iron is still undelivered by the furnace Co., and they can undoubtedly deliver as wanted. We should rather it would be shipped in instalments of 200 to 300 tons of all kinds, as we can then more easily provide for it here. Please keep us advised about it.

"E. P. ALLIS & CO."

35th. Telegram of plaintiff to defendants, dated April 9, 1880, as follows, to wit:

"MILWAUKEE *Apr.* 9, 1880.

"To THOMAS J. POPE & BRO.:

"For what price can you sell our five hundred tons American? Answer.

"E. P. ALLIS & CO."

36th. Telegram of defendants to plaintiff, dated April 9, 1880, as follows, to wit:

"NEW YORK, *Apr.* 9, 1880.

"To E. P. ALLIS & Co.:

"No market just now. Market, it is believed, will be active later on. We think there is no occasion for uneasiness about prices, and might be dangerous to resell. In our judgment, parties are merely operating to break market to purchase. We, however, will act under your instructions.

"THOS. J. POPE & BRO."

37th. Letter of plaintiff to defendants, dated April 9, 1880, as follows, to wit:

"MILWAUKEE, *Apr.* 9, 1880.

"To THOMAS J. POPE & BRO.:

"Answering despatch of this date rec'd. Our object in the enquiry was to learn the market in New York, with a view of seeing
71 whether we could not sell there, and in the depression buy again here at a gain by the exchange. We are in no way alarmed, and have use for all the iron bought, but want, if we can, to take advantage of the state of the market at the East and the West to our gain. It is not at all unlikely that we might within the next 30 days, or perhaps 10 or 15 days, buy here at about the price we could sell for at the East, and so make the freight. The English and Scotch iron we probably could not, but it is quite likely we could with the American. Will you, therefore, advise us from day to day of what you can get for it, and we can at once tell whether we can make by the exchange. Should the American iron be sold there, the English and Scotch could come on under the bank agreement.

"E. P. ALLIS & CO."

38th. Letter of defendants to plaintiff, dated April 10, 1880, as follows, to wit:

"NEW YORK, *Apr.* 10, 1880.

"To E. P. ALLIS & Co.:

"In compliance with your request we telegraphed you yesterday. We should recommend your holding on to your iron; to operate now would perhaps be very dangerous to you, and you might have to buy in at higher prices. The cause of the present confusion is the Glenorn Company who put Grey forge $30; 24, 31; 2c. at 32 on furnace banks for April without having a pound of iron to sell. They were offered $30 per ton prompt cash this week, but replied through the brokers they had none to sell; this is the cause of the market confusion, so far as we can see.
72 "THOS. J. POPE & BRO."

39th. Letter of defendants to plaintiff, dated April 12, 1880, as follows, to wit:

"NEW YORK, *Apr.* 12, 1880.

"To E. P. ALLIS & Co.:

"We are in receipt of your esteemed favor of 9th. We are keeping your iron in mind, but at the present moment it is difficult to sell iron, because buyers are avoiding the market in consequence of an impression that prices may be lower. A vast quantity of buyers have got to come into the market who have been waiting for a long while to make their purchases, and the trouble may be with the market as it has been several times, sudden change and excited market. Number one American irons are really very scarce indeed. Gray forge pig-irons are more abundant.

"THOS. J. POPE & BRO."

40th. Letter of plaintiff to defendants, dated April 13, 1880, as follows, to wit:

"MILWAUKEE, *Apr.* 13, 1880.

"To THOMAS J. POPE & BRO.:

"When the freight men came to see us a few days ago they asked $4.50 fr't on iron. To-day they called and offered it at $4, which we declined. We told them we should sell there and buy here before paying such f't. We believe we can do that at not over $2 to $2.50 difference. On this account we want you to keep us daily, or as often as any change in the market, advised of price at which
73 you can sell each of the lots, Scotch, English, and American, and if we can sell and buy here so as to make anything, we will do so. He said Mr. Williams would call on us about the fr't, and make a low offer, but we don't want you to close it, or ship the iron without asking us beforehand, getting our approval. Iron is weak here, and the chance is good to save f't in part, if not in whole.

"E. P. ALLIS & CO."

41st. Tlegram of defendants to plaintiff, dated April 16th, 1880, as follows, to wit:

"NEW YORK, *Apr.* 16, 1880.

"To E. P. ALLIS & Co.:

"E. B. Brooks & Co. offer freight for shipments until May thirteenth, at three dollars and half.

"THOS. J. POPE & BRO."

42nd. Letter of defendants to plaintiff, dated April 16, 1880, as follows, to wit:

"NEW YORK, *Apr.* 16, 1880.

"To E. P. ALLIS & Co.:

"We have your several favors in relation to your iron, and also about fr'ts, which we telegraphed you to-day would be $3.50 per gross ton up to May 30th, covering all expenses, including insurance and unloading at Milwaukee. We do not see how we can delay the delivery of the iron because of the maturity of the notes, which occur in May; it would be gratifying to us to be able to do so, but cannot see how we can under such circumstances; besides that, we need the money, having carried the iron for you so
74 long. If you could so arrange it with the bank that we can get acceptances, or something from it that would be negotiable for the money, we might be able to do it; but we need, of course, negotiable paper to that end. If you and the bank will provide that, we shall be happy to do so. Interest at 6 per cent. per annum.

"THOS. J. POPE & BRO."

43rd. Letter of defendants to plaintiff, dated April 21, 1880, as follows, to wit:

"NEW YORK, *Apr.* 21, 1880.

"To E. P. ALLIS & Co.:

"Your 500 tons 1 ex. Am. pig-iron are now ready for shipment. We are looking for vessel by which to ship to Milwaukee.

"THOS. J. POPE & BRO."

44th. Letter of plaintiff to defendants, not dated, but received by defendants April 23, 1880, as follows, to wit:

"MILWAUKEE, —— —, 188–.

"To THOMAS J. POPE & BRO.:

"Yours of 16th rec'd, & also telegram as to freight. We certainly ought not to pay over $3.00 per ton, including all charges; and that, as we understand your telegram was Mr. Brooks' offer at that, you can forward 800 tons at your pleasure. We would like the 800 tons divided as follows: 300 tons Scotch; 250 Am., and 250 English, which will leave ½ Am. & ½ English to come later. The last five hundred tons must of necessity be delayed awhile, & can probably rest in this way as well as any other. The bank will pay the
75 notes on receipt of the B. L. for the 800 tons, or parts thereof in proportion. We were in hopes, and still are, that we may get a despatch from you with an offer for 500 tons at a rate that would enable us to buy here and save freight which we think we could do in this depression; but you have not acceded to our request to give us prices. What can you sell the 500 tons Am. for?"

45th. Telegram of defendants to plaintiff, dated April 26th, 1880, as follows, to wit:

"NEW YORK, *Apr.* 26, 1880.

"To E. P. ALLIS & Co.:

"If you propose and bank agree to guarantee notes, we may be able to take notes for three hundred tons at three months, three hundred tons at four months, two hundred tons at five months, two hundred tons at six months, you paying first two notes on three hundred, & remainder endorseable on the first of the new.

"THOS. J. POPE & BRO."

46th. Telegram of plaintiff to defendants, dated April 26, 1880, as follows, to wit:

"MILWAUKEE, *Apr.* 26, 1880.

"To THOMAS J. POPE & BRO.:

"Eight hundred tons can come at three dollars freight, & charges & notes will be paid; the rest must wait awhile.

"E. P. ALLIS & CO."

76 47th. Letter of defendants to plaintiff, dated May 1, 1880, as follows, to wit:

"NEW YORK, *May* 1, 1880.

"To E. P. ALLIS & Co.:

"We have shipped on account of said agreement three hundred (300) tons pig-iron, and have sent the National Exchange Bank of Milwaukee invoice and bill lading for same; also, your acceptance for $10,729.96, which, when paid, will leave a balance in your favor on this shipment of $25.96, which we will credit on next shipment, which will soon follow.

"THOS. J. POPE & BRO."

Hereupon the said plaintiff, by his said counsel, admitted the said counter-claim of said defendants to be just.

And the said defendants, to further maintain the issue on their part, did then and there produce and read in evidence the deposition of V. W. Weaver, which was, in substance, as follows, to wit:

"That his name is V. W. Weaver; that he resides in Coplay, Lehigh county, Penna., and is connected with the Coplay Iron Company, in that place, and is superintendent of said company; that he has been engaged in the manufacture of iron upwards of twenty years; that he knows the said defendants by reputation, but never met them personally; that said Coplay Iron Company has, at different times, sold iron to said defendants; that all the iron shipped to said defendants since 1879 was shipped to Elizabeth-
77 port, N. J., care of A. B. Hazard, and was all Coplay iron; that he is acquainted with the grades and methods of grading pig-iron, and also Coplay pig-iron, and has been acquainted with the grades of pig-iron for upwards of 20 years, and that he is well qualified to determine the grades of pig-iron; that the general method of deciding as to the quality of iron at Coplay and since 1879 had been to wait until the iron cools, and then break two or three pigs, and decide as to the quality; then the iron is loaded upon trucks, a ton on each truck, and taken to the wharf for loading, and there piled in ten-ton piles, and marked in large letters, with white lead, the grade of it; that the iron is graded and shipped at Coplay mine by Marcus Ruthermal; that is to say, he breaks the pigs and determines the quality; that a cast sometimes consists of from seven to eight beds, and may consist of different grades of iron; that the brand of an iron is the whole make of the furnace, as, for instance, the Allentown brand means the iron made by the Allentown Iron Company; that each brand is divided into grades according to the quality of the iron, and some brands have fewer grades than others; that each grade of iron is piled by itself and marked at the time it is piled; that *his* to say, no two grades are piled in the same ten-ton piles; that one pig is marked in each ten-ton pile, unless it is not plain, when a second pig is marked; that Mr. Ruthermal, who grades the iron, attends to putting it on the cars when it is shipped; that, as a general thing, he saw the
78 morning and evening casts in the morning when he came out, and saw Ruthermal break and grade it; that he did not always see the afternoon cast, but saw it in piles every day, so as to see what they were loading; that he knows Marcus Ruthermal grades the iron as well as any one in the Lehigh Valley, and is thoroughly competent; that he does not think there is any concern in the Lehigh more accurate than ours. It was, as a matter of fact, carefully and accurately graded; that, as to the bills of lading, we take the numbers of the cars, the grade of the iron shipped on each car, and the quality that is taken in our book of manifests, and from that copies are issued for the railroad company, and think there is a postal sent to Mr. Hazard and to Mr. Pope, informing them of the shipment, and a copy of the bill of lading is forwarded to Mr. Hazard.

"That in putting piles on the wharf piles of different grades are put there indifferently, and one pile may be one grade and the one next to it another; that the demand for iron in April and May, 1880, was very great and the prices high; that the furnace — not exert itself to larger deliveries than usual; that at this time the furnace had large demands on it, but Mr. Pope's iron was nearly ready; that he visited Milwaukee last summer, and inspected a lot of iron there pointed out to him by Mr. Charles Allis."

And hereupon the said plaintiff offered to read in evidence
79 questions 7 and 8, and the answers thereto of said cross-examination of said Weaver, to which said reading the said defendants did then and there object, for the reason that the quality of a lot of iron delivered from lake vessels to said plaintiff in Milwaukee was irrelevant, incompetent, and immaterial, until it is shown or proposed to be shown, by competent evidence, that the said iron delivered in Milwaukee to said plaintiff from lake vessels was the same identical iron shipped, or agreed to be shipped, under the said contract as read in evidence; and the said judge did then and there declare his opinion to be that such evidence was competent, and did overrule said objection, to which ruling and decision the said defendants did then and there by their said counsel except; and thereupon the said questions 7 and 8, and the answers thereto, were read as follows, to wit:

"Question 7. Was that iron examined in Milwaukee such as you would grade No. 1 extra, at your furnace?

"Answer. No, sir; there was some there that did not seem up to our No. 1 Ex.

"Question 8. As a lot, would it grade as No. 1 extra?

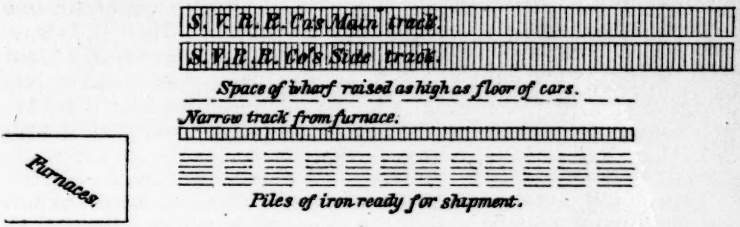
"Answer. No, sir; I don't think it would."

And the said defendants, to further maintain the issue on their part, did then and there produce and read in evidence the deposition of Benjamin S. Levon, which was in substance as follows, to wit:

"That his name is Benj. S. Levon, and that he is 75 years of age; that he lives at Coplay, and is assistant superintendent of the Coplay Iron Co.

80 "He has attended about the mines and furnace since the Coplay Iron Company commenced; that he never paid any particular attention to the grading of the iron, but thinks the Coplay Co. grades its iron pretty sharp; that he has been about iron works over fifty years, superintending most of the time; that he used to be perfectly familiar with the grading of iron, and knows the different kinds when he sees it."

"That the iron at the Coplay Company is graded and piled after casting, and it gets cold; it is marked according to grade Ax, Bx, &c., with a brush and white lead; that is, each pile is so marked; it is marked on one pig in each pile, sometimes on two pigs; it is all taken out on little trucks; the piles commence near the railroad track; the below drawing shows how it is done:


S. V. R. R. Co's Main track.
S. V. R. R. Co's Side track.
Space of wharf raised as high as floor of cars.
Narrow track from furnace.
Furnaces.
Piles of iron ready for shipment.

"The first lines show the main track of the railroad; the next the side track; the next, the face of the stone wharf raised as high as the floor of the car; the next, the narrow track leading
81 from the furnace, and the short lines show the manner of piling the pigs of iron in piles of ten tons each; the grades of iron at the Coplay furnace are determined by looking at it and breaking it, that is the pigs, until we are satisfied of the quality; this is done as soon as it is cold, when it istaken out of the bed. He thinks the man who grades the Coplay iron is one of the best men in the valley, and has had a good deal of experience in that business; is very accurate and careful."

And said defendants, to further maintain the issue on their part, introduced and read in evidence the deposition of V. W. Weaver, Jr., which was in substance as follows, to wit:

"That his name is V. W. Weaver, Jr., and he is 24 years old, and is assistant clerk in the office of the Coplay Iron Company; that he has generally attended to the shipping of the iron mentioned in the 2nd answer of his brother, James W. Weaver, from Jan. 8, 1880, to June 15, 1880, and up to the present time; that he had nothing to do with the loading of the iron and knew nothing about the grade of the iron sent to Elizabethport or to Hazard, or from what piles it was taken; that he does not recollect who superintended the shipping of this iron. It was Ruthermal's business to attend to the shipping."

And said defendants, to further maintain the issue on their part, introduced and read in evidence the deposition of W. H. Ainey, which in substance was as follows, to wit:

82 "That his name is William H. Ainey; is a resident of Allentown, Penna., and is treasurer of the Coplay Iron Company; that he has worked in iron as manager of blast furnace upwards of twelve years; that the grading of the Coplay iron is done under the general direction of Mr. V. W. Weaver, Sr., superintendent, and assisted by Marcus Ruthermal, the iron man, and the founder, Abraham Miller."

And said defendants, to further maintain the issue on their part, introduced and read in evidence the deposition of E. P. Wilbur, which in substance was as follows, to wit:

"That his name is E. P. Wilbur, and is chairman of 'The Coplay

Iron Company;' that he is acquainted with Thomas J. Pope and James E. Pope; that he is acquainted with Coplay pig-iron; that the 'The Coplay Iron Co.' makes grades 'Ax,' 'A,' 'Bx,' 'B,' 'Cx,' & 'C'; that 'Ax' is 'No. 1x' iron; that the iron at the Coplay Company between June, 1879, and June, 1880, was graded under the direction of V. W. Weaver, Sr., who is the superintendent; that the iron is graded by breaking the pigs as they are taken from the pig bed; that the iron is piled according to its grades directly from the pig bed."

And said defendants, to further maintain the issue on their part, introduced and read in evidence the deposition of James W. Weaver, which in substance was as follows, to wit:

83 "That his name is James W. Weaver, and that he resides at Coplay, Lehigh county, Penna.; that he has shipped iron on contracts with Thomas J. Pope & Bro.; that he has shipped for Thomas J. Pope & Bro.

Dec.	23, '79.	To	Hazard at Elizabethport,	140 tons	No. 1 extra.	
"	24, "	"	" "	40 "	"	
"	29, "	"	Lockport, N. Y.,	50 "	"	
"	30, "	"	" "	50 "	"	
"	31, "	"	Watertown, "	37 "	silver gray.	
Jan.	15, '80.	"	Jersey City, N. J.,	50 "	No. 2 extra.	
"	16, "	"	Hazard at Elizabethport,	29 "	silver gray.	
"	19, "	"	" "	100 "	No. 2.	
"	19, "	"	Jersey City, N. J.,	50 "	No. 2 extra.	
"	22, "	"	" "	30 "	"	
Feb	5, '80.	To	Rochester, N. Y.,	50 tons	No. 1 extra.	
"	9, "	"	Dunkirk, "	10 "	"	
"	13, "	To	Hazard, Elizabethport,	20 tons	No. 1 extra.	
"	17, "	"	Philadelphia,	20 "	2 "	
"	25, "	"	Hazard, Elizabethport,	100 "	2 "	
March	2, '80.	To	Reading, Pa.,	20 "	1 "	
"	3, "	"	Syracuse, N. Y.,	20 "	2 "	
"	4, "	"	Altoona, Pa.,	50 "	2 "	
"	4, "	"	Syracuse, N. Y.,	20 "	2 "	
"	5, "	"	Altoona, Pa.,	50 "	2 "	
"	5, "	"	Syracuse, N. Y.,	50 "	2 "	
"	6, "	"	Altoona, Pa.,	50 "	2 "	
"	9, "	"	Reading, Pa.,	20 "	2 "	
"	9, "	"	Syracuse, N. Y.,	50 "	2 "	
84						
"	10, "	"	Altoona, Pa.,	30 "	2 "	
"	10, "	"	Syracuse, N. Y.,	60 "	2 "	
"	12, "	"	Reading, Pa.,	10 "	1 "	
April	8, "	"	" "	30 "	1 "	
"	14, "	"	" "	20 "	1 "	
"	24, "	"	Hazard, Elizabethport,	50 "	1 "	
"	26, "	"	" "	60 "	1 "	
"	27, "	"	" "	40 "	1 "	
"	28, "	"	" "	30 "	1 "	

April	29, '80.	To Hazard,	Elizabethport,		50	tons No.	1	extra.
"	30, "	"	"	"	60	"	1	"
May	1, "	"	"	"	10	"	1	"
"	4, "	"	"	"	30	"	1	"
"	5, "	"	"	"	20	"	1	"
"	8, "	"	"	"	30	"	1	"
"	10, "	"	"	"	60	"	1	"

"That he has been employed in iron furnaces about eight years, and is acquainted with the grades of Coplay iron, but has nothing to do with the grading of the iron; that he made out manifest, saw the iron on board the cars, and took the number of the cars, and knew that the cars left."

And said defendants, to further maintain the issue on their part, introduced and read in evidence the deposition of Marcus Ruthermal, which in substance was as follows, to wit:

That his name is Marcus Ruthermal, and his business is
85 working on the iron wharf at Coplay for the Coplay Iron Company; that he has been engaged in the manufacture of pig-iron for twenty years; that his special business is breaking the iron, sorting or grading, and shipping it; that he is thoroughly familiar with the grading of pig-iron, and established originally the grades of the Coplay Iron Co.; that all the iron shipped to A. B. Hazard, at Elizabethport, for Thomas J. Pope & Bro., in 1879 and 1880, was shipped under his supervision, as he showed the men the piles from which it was to be taken, and saw it taken from the piles he pointed out; that all the iron shipped to Elizabethport to A. B. Hazard for Thomas J. Pope & Bro., and mentioned in said Weaver's deposition as No. 1 extra was No. 1 extra pig-iron; that he examines the iron when it becomes cold and determines the grade and places the iron of each separate grade in separate piles, and then sees to the marking of the piles with white lead; that the iron shipped to Elizabethport to A. B. Hazard and for Thomas J. Pope & Bro. was properly graded, separated, and shipped; that he cannot be mistaken as to the grade of iron shipped; that during 1879 & 1880 the Coplay iron was graded carefully; that the iron shipped in 1879 & 1880 corresponded with the established No. 1 extra Coplay; that the iron which was sent to Hazard to Elizabethport for Thomas
J. Pope & Bro. was properly graded at the furnace, and that
86 none of it was mixed up, and that he did not know what became of the iron after it left the furnace in the cars; that he saw all the iron piled on the wharf at the railroad and paints the grade of iron himself on the different piles."

Being cross-examined witness said "I have no particular recollection of this iron shipped to Pope & Bro. at Elizabethport, not any more than my business generally. All I know of its being properly graded is what I know of our usual way of doing business."

Said defendants to further maintain the issue on their part introduced and read in evidence the deposition of Frederick Hand, which in substance was as follows, to wit:

"That his name is Frederick Hand; is 24 years of age; reside at

Elizabethport, N. J.; is a clerk for A. B. Hazard, and is employed at the 'Iron Dock' at Elizabethport, N. J., and has been employed there over a year; that his special employment upon the iron dock is to receive the iron as it comes, and see where it is unloaded on the dock; that he looks at his manifest and then at the iron, and sees whether it is the grade manifested; that he then reports to the boss, Mr. Hazard, where it is put, whom it is billed to, and what grade it is, and that he marks on the iron, with paint, the grade, to whom it belongs, and when it is ordered to be shipped; that when Mr.
87 Hazard authorizes the shipping of any iron he authorizes me to — such a pile of iron as the order calls for; that he then does so, and sees that the iron is shipped and taken from the dock; that he then has the captain of the vessel taking the iron sign his bills; that he then reports to Mr. Hazard that it is shipped according to his instructions; that when he receives the iron he separates the piles of different grades by standing pigs; that the iron is first thrown off lengthways on the dock, and then at the end of the pile we stand pigs up sloping against it two pigs at each end, and the pile the pigs lean against is the pile they belong to; that he paints the grade of the pile on the top of the pile on two or three pigs; that he is acquainted with pig-irons and knows the different grades and brands, and knows Coplay from other brands of iron; that he remembers having received iron for Thomas J. Pope & Bro. from the Coplay Company, and having shipped it during the year 1880, and that he has a memorandum of that iron of the dates, accounts, vessels by which shipped, and the place to which consigned, and that the following is a copy:

88 *Thomas J. Pope & Bro., Coplay Pig-Iron rec'd & ship'd by A. B. Hazard.*

Date m'f 'c'd.	1 x.	2 x.	2.	S. G.	Date ship'd.	Name of vessel.	Destination.	1 x.	2 x.	2.	S. G.
1879.					1880.						
					Jan. 5	Ann Amelia	New Haven	20			
Dec. 23	140				8	John Brooks	do.	50			
24	40				14	Hannah E. Brown	do.	50			
1880.					Ap'l 28	B. J. Hunting	Milwaukee	60			
					Jan. 28	Baltimore	New Haven				10
Jan. 16				29	July 8	Compromise	New York				10
					Sep. 7	C. P. Shultes	New Haven				9
Jan. 19			100		Jan. 27	A. T. Miner	Saybrook			60	
					Feb. 12	R. L. Stuart	Greenpoint			40	
Jan. 24		70			Alert		Stamford		20		
Feb. 13	20				Mar. 15	Onward	Providence	20			
25		100			30	Alert	Stamford		80		
					June 12	C. Comstock	Middletown		20		
					July 12	Signal	New Haven		10		
					Sep. 25	Trucks	E. Port		40		
Ap'l 24	50				Ap'l 30	Kiowa	Milwaukee	50			
26	60				May 1	John Pilbman	do.	60			
27	40				Ap'l 28	B. J. Hunting	do.	40			
28	30				May 1	John Pilbman	do.	30			
29	50				Ap'l 30	Kiowa	do.	50			
30	60				May 1	John Pilbman	do.	10			
					6	D. H. Winans	do.	50			
May 1	10				May 6	D. H. Winans	do.	10			
4	30				"	Do.	do.	30			
5	20				"	Do.	do.	10			
					12	Bertha	do.	10			
8	30				"	Do.	do.	30			
10	60				"	Do.	do.	60			

89 "That he personally superintended the shipping of the iron mentioned in above memorandum, and that said iron was shipped as specified in said memorandum; that the shipments of the iron were made, consigned to Milwaukee, as follows:

"April 28, 1880, 60 tons.
"April 30, 1880, 50 tons.
"May 1, 1880, 60 tons.
"April 28, 1880, 40 tons.
"May 1, 1880, 30 tons.
"April 30, 1880, 50 tons.
"May 1, 1880, 10 tons.
"May 6, 1880, 50 tons.
"May 6, 1880, 10 tons.
"May 6, 1880, 30 tons.
"May 6, 1880, 10 tons.
"May 12, 1880, 10 tons.
"May 12, 1880, 30 tons.
"May 12, 1880, 60 tons.

"That he never to his knowledge made a false shipment of iron since he had been in the business, and that, if one grade was shipped when a different grade was ordered it would be very soon detected by the iron that was left on the dock; that he did not prepare the above memorandum; that he does not know as he would know positively about these shipments without the memorandum, as he does not have much to do with it after he reports to the
90 "Boss;" that he does not remember what grade of iron was sent by particular vessels, nor at particular dates; that Mr. Hazard received, during the time this bill covers, at Elizabethport and sent off large quantities of iron for Thomas J. Pope & Bro.—how large these quantities were he cannot say without looking at the bills; that he don't remember what was shipped, whether it was as much as five thousand tons (5,000) or not; that he cannot give any approximate amount of the iron shipped by Mr. Hazard for Pope & Bro.; that the iron shipped to Milwaukee was shipped in canal boats; that one to two hundred tons of iron can be loaded on a canal boat according to the depth of the water in the particular canal; that at Elizabethport we pile the iron in one hundred to one hundred and fifteen-ton piles; that he does not remember how large the piles were of the iron mentioned in above memorandum; that he does not remember how much iron was received and shipped at Hazard's yard from January to May, 1880; that he superintended the receiving and shipping of all the iron at Hazard's yard since January, 1879; that he keeps the dock slate, the 'sketch of the dock;' that the 'sketch of the dock' is a book with the number of piles and the number of tons in each pile, the quality of the iron, and the brand of each pile; that he can tell Coplay iron at sight from any other iron we ship at Hazard's dock; that he can tell the grade of pig-iron at sight by breaking it; that
91 he does not break a part of every shipment received unless there is a doubt in the manifest, which there sometimes is; that he does not remember whether he broke a single pig of the

iron shipped to Milwaukee; that the grade of iron is not always named in the manifest, but that it is usual in shipping iron to name the grade in the 'shipping receipt,' or 'bill of lading;' that he does not remember particular cases when the grade of iron shipped was omitted; that it is a part of his duty to procure bills of lading for the iron he sees loaded; that Mr. Hazard furnishes the bills of lading at Elizabethport; that Mr. Hazard fills them up; that he furnishes the captains with the bills of lading and takes receipts from them; that he does not remember the shipment of Scotch iron to Milwaukee."

"That his business is to receive the iron and pile it up on the dock when it is sent to Mr. Hazard, to keep a dock book and to report to Mr. Hazard as often as a pile is made; that Mr. Hazard has a book-slate in his office with a picture of the dock drawn on it, which pictures each pile as it lays on the dock, which side of the dock it is on, the grade of the iron and the brand of each and every pile; that whenever a pile of iron is placed on the dock a memorandum of it is put on the slate showing as stated; that when a pile is taken off the dock it is wiped off the slate; that entries are made for permanent preservation of shipments in the bill of lading book, and in the regular books of receipts in the slate and in the books;
92 that he receives the iron, sees to its being piled, ships it and takes receipts for it, and that he reports these things whenever he has done them to Mr. Hazard; that he has reported to Mr. Hazard all the iron he has shipped since he has been on the dock, and that the reports thus made were true; that he does not remember the dates of the shipments of iron for Pope & Bro., without reference to the memorandum, nor the amount of iron shipped; that he compared the memorandum that very morning with Mr. Hazard's books, and that it is a true copy of his books; that a quantity of Scotch iron shipped to Milwaukee was never on Hazard's dock; that, if the particular amount of iron received at one time is large, it is placed in different piles of about 100 tons each, if the amount be small is is all piled together; that as a general thing a portion of every lot of iron received is broken by us so as to determine the grade; that he does not remember of having ever shipped any other lot of iron for Pope & Bro., to Milwaukee, except the lots here in question; that he has a sketch showing the manner of piling iron on the dock, and giving a top view of the pile, and the end view of the pile, and that the following is a copy thereof:

Fig. 1.

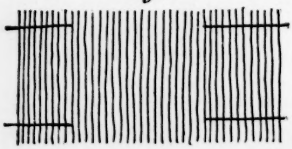


Fig. 2.

"That the bills of lading (mentioned and set forth below)
93 are not the bills of lading made out by Mr. Hazard, and which he furnishes to the captains.

"That there is not a special place on the dock for piling the different grades of iron; that they are not piled indifferently, and that piles of different grades are not put together; that they are piled according to the size of the pile wherever we had room to put them; that the iron is piled as high as the length of the space which we have to put the iron into allows; that he never saw two different grades of one brand of iron next to one another; that the two piles shown in figure 2 of the picture are different grades of iron, but that different grades of iron are not often piled in that way, but has seen lots of iron so piled; that the pile of one grade does not lap over the pile of another, but that the piles are divided by pigs of iron; that if possibly two grades of one brand are together the pile of one grade laps over tne pile of another, separated only by the upright pigs; that whenever iron is piled as shown in figure 2, there is nothing to separate the two grades except the upright pigs, but generally the piles are much more perpendicular than is shown in figure 2, when piles adjoin each other; that the memorandum mentioned above is a copy of Mr. Hazard's books; that is not a copy of anything in his handwriting; that is a copy of Mr. Hazard's book, which he kept the accounts in; that he compared it with the book that morning at Mr. Hazard's office; that the book is kept by
94 Mr. Hazard; that this memorandum is a copy of the page headed Thos. J. Pope & Bro., and contains everything that there is on that page; that the book is kept in the same form and the same arrangement of columns as the memorandum.

"That he has seen iron piled as shown in figure 2, but that generally there is a separation between the piles; that it is only when we are crowded for room that there is no space between the piles; that the memoranda made at the time of the transaction are made upon book slates, and that the same are reported to Mr. Hazard and entered upon his book, and that then the entry on the slate is wiped out. That he has seen lots of iron piled as shown in figure 2.

"That by 'lots of iron' he does not mean large quantities, but different lots of iron.

"That he could not say how many piles of that character there were now on the dock, whether one or a dozen.

"That he could not say how many piles there were on the dock of that character now, because he did [not] notice this morning how many were so piled; that the adjoining pile does not ever fall over and get mixed with the pile being taken away; that he never knew such a thing to happen."

And said defendants, to further maintain the issue on their
95 part introduced and read in evidence the deposition of Albert Hazard, which, in substance, was as follows, to wit:

"That his name is Albert Hazard; that he is 49 years of age, and is an iron shipping agent, doing business at Elizabethport, N. J.; that he resides at Elizabeth, N. J.; that he has known Thos. J. Pope for 21 years and James E. Pope for 4 years; that he knows the lot of 500 tons of iron consigned to his care for Thos. J. Pope & Bro. at different times, which was received in due course and shipped

in 100-ton lots on five canal boats, as stated in the memorandum mentioned above, which memorandum was taken from his book; that when he receives a manifest by mail or car, he tells his clerk or the railroad man who unloads the iron how to unload it, that is, how much to put in a pile; that the moment he receives the manifest he enter it on his books; when unloaded, the railroad agent or his clerk, or both, tell him how and where it is placed on the dock, a memorandum of which he puts on his book slate, which is a profile of the dock: that when the vessel arrives for the iron he tells the clerk what piles of iron to give her, which he does, and notifies him of having done so, which notification he puts on his bills of lading on the blank side thereof, opposite the one which the captain has to sign; that he not only puts on his book slate the position and number of tons of the iron on the dock, but also puts it on the back
96 of the manifest received for that amount of iron; that when the iron is shipped the memorandum of that lot is rubbed off the slate and the slate remains blank until another lot comes, when the same thing is done over; that he always found the dock to correspond with his slate in the office; that the entries from which the memorandum was taken were truly made according to the report of Mr. Hand to him; that he made the entries himself and does all of his own bookkeeping and correspondence."

Hereupon the said defendants offered to introduce and read in evidence the fifth question of said examination of said witness Albert Hazard, and the answer of said witness thereto, which were as follows:

"Q. 5. Have you ever known the wrong lot of iron to be shipped, and if such a thing should happen, would it be discovered, and how?

"A. I have never known the wrong lot of iron to be shipped; if such a thing should happen, I could tell by the dock not agreeing with my slate."

To the introduction and reading of which, said plaintiff, by his counsel, did then and there object, for the reason that the said matter was irrelevant to the issue, which said objection was then and there argued by the counsel for the respective parties, and thereupon the said judge declared his opinion to be that said
97 matter was irrelevant, and sustained said objection, to which said ruling and decision the said defedants, by their counsel, did then and there except.

Hereupon the said defendants, to further maintain the issue on their part, introduced and read in evidence the remaining part of the deposition of said Albert Hazard, which in substance was as follows, to wit:

"That there is no danger of different piles of iron, as piled on his dock, of getting mixed together; that it is very unlikely that piles of pig-iron would run together.

"That he handled on his dock from Jan'y 1st, 1880, to the middle of May, 1880, from 20,000 to 30,000 tons of iron. That this was a pretty excited period in iron. That it is usual in shipping iron to note the grade on the bill of lading or shipping receipt, but is not

always done. That he is not positive whether it was done in shipping the 500 tons to Milwaukee, but thinks it was. That the above mentioned memorandum is not an exact copy of his books.

"That he does not remember of having shipped during this period any other iron for Pope & Bro. to Milwaukee besides the 500 tons in question. That during this period, from January to June, 1880, he had no other Coplay iron belonging to Pope & Bro. except what is shown in the above mentioned memorandum. That said memorandum is not an exact copy of his book, because the ruling is not exactly like his book, and the credit side of this memoran-
98 dum is picked out so as to make the different lots, as they come in, balance with the lots as they are taken away. That everything is precisely as on his book, except that the shipments are sorted out so that each lot balances itself; for instance, on April 28 he had 60 tons of the 180 tons manifested December 23 & 24, 1879, left there, and on that day (April 28) 40 tons came in and he shipped that direct from the car and the 60 tons from the dock which made up the 100 tons, and in the memorandum he put the 60 opposite the 180 and the 40 opposite the 40. That all the words and figures are exactly as in his books, except that they are transposed as stated."

Said defendants, to further maintain the issue on their part, introduced and read in evidence two bills of lading, of which the following are copies:

No. ——. BUFFALO, N. Y., *June 9th*, 1880.

Shipped in good order and well conditioned, by C. H. De Forest, agent and forwarder, for account and at the risk of whom it may concern, on board the schooner May Collins, whereof N. P. Hines is master, the following articles, to be delivered in like good order and condition, as addressed, consignees paying the freight and charges, as noted below, (the dangers of navigation, fire, and collision excepted).

In witness whereof, the master of said vessel hath affirmed to two bills of lading of this tenor and date, one of which being accomplished, the other to stand void.

99 400 gross tons pig iron from dock, weight estimated; National Exchange Bank, Milwaukee, Wis.

Lake freight one dollar per gro. ton, delivered on dock "C. C."

N. P. HINES, *Master.*

Subject to canal frt. & charged to & at Buffalo, advanced by C. H. DeForest as per his sight draft for $1,000.00.

Bt. Bertha, 100 tons, American.
" Winans, 100 " "
" Robinson, 100 tons, foreign.
" Preston, 100, " "

No. ——. BUFFALO, N. Y. *June 15th*, 1880.

Shipped in good order and well conditioned by C. H. DeForest, agent and forwarder, for account and at the risk of whom it may

concern, on board the schooner R. C. Crawford, whereof ——— is master, the following articles, to be delivered in like good order and condition, as addressed, consignees paying the freight and charges as noted below (the dangers of navigation, fire, and collision excepted).

In witness whereof, the master of said vessel hath affirmed to two bills of lading of this tenor and date, one of which being accomplished, the other to stand void:

400 gro. tons pig-iron from dock; weight estimated; National Exchange Bank, Milwaukee, Wis.

Lake freight $1.00 per ton, delivered on dock C. C., say 50 tons on deck.

WM. NELSON.

Subject to canal frt. & charges to & at Buffalo, advanced
100 by C. H. DeForest, agt., as per his sight draft for $1,000.00.

Bt. Cromwell, 100 tons, foreign.
" Pilbman, 100 " American.
" Kiowa, 100 " "
" Hunting, 100 " "

The defendants did then and there offer in evidence and read five (5) bills of lading, of which the following contains the substance of them, to wit:

(1.) The Hudson line, by river, canal, and lakes, E. B. Brooke & Co., agents, 7 South St., N. Y:

NEW YORK, *April* 28, 1880.

Received from Messrs. Thos. J. Pope & Bro., @ Elizabethport, N. J., the following property in apparent good order, on board boat Ben. J. Hunting, namely:

Consigned and to be delivered to:

Act. & order Thos. J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis., one hundred (100) tons pig iron.

The Hudson line agrees to forward * * * the same through * * * to Milwaukee, Wis.

(Signed) E. B. BROOKS & CO., *Agents.*

(2.) The Hudson line by river, canal, and lakes, E. B. Brooke & Co., agents 7 South St., N. Y.:

NEW YORK, *April 30th*, 1880.

Received from Messrs. Thos. J. Pope & Bro., @ Elizabethport, N. J., the following property in apparent good order, on board boat " Kiowa," namely:

101 Consigned & to be delivered to:

Ac. & order Thos. J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis., one hundred (100) tons pig iron.

The Hudson line agrees to forward * * * the same through * * * to Milwaukee, Wis.

(Signed) E. B. BROOKE & CO., *Agents.*

3. The Hudson line by river, canal, and lakes, E. B. Brooke & Co., agents, 7 South St., N. Y.

NEW YORK, *May* 1, 1880.

Received from Messrs. Thos. J. Pope & Bro., at Elizabethport, N. J., the following property, in apparent good order, on board boat Jno. Pillmore, namely:

Consigned and to be delivered to ac. & order Thos. J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis., one hundred (100) tons pig iron.

The Hudson line agrees to forward * * * the same through * * * to Milwaukee, Wis.

(Signed) E. B. BROOKE & CO., *Agents.*

4. The Hudson line, by river, canal, aud lakes, E. B. Brooke & Co., agents, 7 South St., N. Y.

NEW YORK, *May 6th*, 1880.

Received from Messrs. Thos. J. Pope & Bro., at Elizabethport, N. J., the following property, in apparent good order, on board boat D. H. Winans, namely:

102 Consigned and to be delivered to ac. & order Thos. J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis., one hundred (100) tons pig iron.

The Hudson line agrees to forward * * * the same through * * * to Milwaukee, Wis.

(Signed) E. B. BROOKE & CO., *Agents.*

5. The Hudson line, by river, canal, and lakes, E. B. Brooke & Co., agents, 7 South St., N. Y.

NEW YORK, *May* 12, 1880.

Received from Thos. J. Pope & Bro., at Elizabethport, N. J., the following property, in apparent good order, on board boat Bertha, namely:

Consigned & to be delivered to ac. & order Thos. J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis., one hundred (100) tons pig iron.

The Hudson line agrees to forward * * * the same through * * * to Milwaukee, Wis.

(Signed) E. B. BROOKE & CO., *Agents.*

Which said bills of lading were admitted to have been the shipments of the iron in question.

And thereupon the defendant rested.

And the above and foregoing was all the testimony given on the trial in this cause.

103 And thereupon the said defendants, by their counsel, did ask the judge to instruct the jury to return a verdict for the defendants, and against the plaintiff, for the reason that from the undisputed evidence it hath been proven that the defendants delivered iron on board canal boats at Elizabethport, N. J.,

according to the terms of the contract between them, and the said plaintiff had carried out the contract on their part, which said motion was then and there argued by the counsel for the respective parties, and the said judge did then and there declare his opinion to be that there is here a question of fact for the jury, whether the the iron shipped at Elizabethport was the same iron which arrived in Milwaukee, and did refuse to grant said motion of defendant, and to which said ruling and decision the said defendants, by their counsel, did then and there except.

And thereupon the said defendants, by their counsel, did ask said judge to instruct the jury—

First. To return a verdict for the defendants.

Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said defendants, by their counsel, did then and there except.

Second. That they are not at liberty to disregard the evidence of credible witnesses who testify positively to facts within their own knowledge, and that as there is no evidence in the case showing what the quality of the iron was which was delivered on to the canal boats at Elizabethport, New Jersey, except that offered and read by the defendants, the jury are not at liberty to disregard
104 that evidence, or to infer or guess or surmise that the iron delivered in Milwaukee was the same iron that was shipped at Elizabethport. That the burden of proof being on the plaintiff, the plaintiff must prove by competent evidence that the iron received in Milwaukee was the same iron that was shipped at Elizabethport.

Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said defendants, by their counsel, did then and there except.

Third. That there is no presumption of law in this case and no presumption of fact that the iron delivered from lake vessels in Milwaukee was or is the same iron that was shipped in canal boats at Elizabethport.

Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said defendants, by their counsel, did then and there except.

Fourth. That the undisputed evidence in this case is that the iron delivered in Milwaukee was delivered in a mixed condition—Scotch iron and American iron being so mixed and intermingled that the plaintiff were compelled to and did separate them. That this is evidence tending to destroy a presumption that the iron delivered in Milwaukee was the same iron that was shipped at Elizabethport.

105 Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said defendants, by their counsel, did then and there except.

Fifth. That the sworn complaint of the defendants read in evidence is no evidence of any facts which are therein stated or alleged to be on information and belief.

Which said instruction said judge did then and there refuse to

give to the jury, and to which refusal the said defendants, by their counsel, did then and there except.

Sixth. That if the jury believe the evidence of the witnesses who testify on the part of the defendants as to the quality of the iron that was delivered on to the cars at the furnace bank, or into the canal boats at Elizabethport, New Jersey, and that the iron was of the quality testified to by said witnesses, then their verdict must be for the defendants.

Which said instruction said judge did then and there refuse to give to the jury, and to which refusal the said defendants, by their counsel, did then and there except.

Seventh. That the plaintiff has not established by proof the contract stated, alleged, and set forth in the complaint. That the evidence shows that the plaintiff was not to have the iron delivered to him at Milwaukee. That this is not a mere variance, but is such a failure of proof as will prevent a recovery in this case.

Which said instruction said judge did then and there re-
106 fuse to give to the jury, and to which refusal the said defendants, by their counsel, did then and there except.

Eighth. That if they find from the evidence that the defendants delivered on board of canal boats at Elizabethport, N. J., five hundred tons of No. 1 Extra Coplay iron, and received therefor the bills of lading read in evidence, and forwarded such bills of lading indorsed in blank to the Milwaukee Bank; that from that time said iron was at the risk of the bank or its assigns, and not at all at the risk of defendants, and that from the time of such shipment and transfer of the bills of lading the burden of proof is upon the plaintiffs to show that the identical iron shipped on the canal boats was the same iron delivered in Milwaukee, and this fact must be shown by evidence; it cannot be found without evidence, and the mere fact that a quantity of iron is received by plaintiff from lake vessels under bills of lading showing a shipment of Scotch and American iron all mixed up is not of itself sufficient evidence or any legal evidence on which a jury can legally find that the iron delivered in Milwaukee was the same iron shipped in canal boats at Elizabethport. That the jury are instructed that the fact that the iron delivered from the lake vessels was all mixed up, Scotch iron with American iron, raises the presumption that the iron delivered in Milwaukee was not the same iron delivered on the canal boats at Elizabethport.

107 Which said instruction said judge did then and there refuse to give, except as given in general charge to the jury, and to which refusal to give said instruction without qualification the said defendants, by their counsel, did then and there except. And the judge's said general charge to the jury was as follows, to wit:

United States Circuit Court, E. Dist. Wisconsin.

EDWARD P. ALLIS *vs.* THOMAS J. POPE *et al.*

DECEMBER 7, 1881.

The plaintiff alleges in this case, gentlemen of the jury, that in January, 1880, the defendants agreed to sell and deliver to him, to

be shipped and delivered at Milwaukee, after the opening of navigation, 500 tons of No. one extra iron, at the price of $34 per ton, to be paid on the receipt of bills of lading; the plaintiff also to pay the freight on the iron and $1.00 per ton for conveying the same from the furnace to the place of loading, and interest at six per cent. for four months on the price of the iron.

That afterwards, and in May, 1880, on receipt of the bills of lading, and before the arrival of the iron in Milwaukee, and before he had any opportunity to see or examine it, the plaintiff paid to the defendants the contract price of the iron, with six per cent. interest for four months, and one dollar per ton for carrying the iron
108 from the furnace to the place of shipment, amounting in all to $17,840, and that he also paid the freight on the iron, amounting to $1,750.

The plaintiff alleges further that on receipt and inspection of the iron it was found not to be No. one extra iron; that it was of inferior quality and value, and not of the quality called for by the contract; that he thereupon refused to accept it, and notified the defendants that the iron was deposited subject to their order and disposal; and this suit is brought to recover back the sum of money which the plaintiff paid to the defendants on account of the iron, and the $1,750 freight money also paid, including the further sums of $250 claimed to have been paid as expense of unloading and piling the iron and $184 charged for storing the same on the plaintiff's premises, amounting in all to $20,024, with interest.

The defendants, by their answer, say that they agreed to sell and deliver to the plaintiff at the furnace bank at Coplay, Lehigh county, Penn., free to the cars, 500 tons No. one extra American iron, at and for the agreed — of $34.00 per ton, which the plaintiff agreed to pay on delivery of the iron to cars at the furnace bank by giving his notes therefor at four months, with interest at six per cent., and also to pay $1.00 per ton freight on the iron from the furnace bank to the place of loading.

109 That subsequently the defendants delivered to the plaintiff, on board the cars at the furnace bank at Copley, the 500 tons of iron; that it was No. one extra American iron, and was of the kind and quality required by the contract, and was worth, at the time of the purchase thereof by the plaintiff, $34 per ton. And so the defendants allege that they fully performed all the conditions of the contract on their part, and that the plaintiff received and paid for the iron.

The defendants also, by suitable denials in their answer, put in issue all the allegations of the plaintiff's complaint which state the contract otherwise than as it is alleged by the defendants, and all averments which are made the basis for charging liability upon them, and also affirmatively allege that there are many kinds and qualities of No. 1 extra American pig-iron, and that the acts of the plaintiff in depositing the iron on his premises were on his own account, and without the approval of the defendants, and without adequate or proper cause.

The defendants also set up a counter-claim, to the effect that in

January, 1880, the defendants sold to the plaintiff 500 tons of English pig-iron at and for the agreed price of $31.00 per ton; that the iron was to be delivered to the plaintiff at New York, and that he promised to pay the contract price, amounting in all to $15,500, on such delivery of the iron. That the iron was duly imported,
110 and was ready for delivery in May, 1880, and that the defendants offered to deliver the same to the plaintiff, and demanded payment. That the plaintiff refused to receive the iron or to pay for it, and that thereupon, on notice to the plaintiff, the defendants sold the iron for its then full market value, namely, $20 per ton, amounting in all to $10,000. That there was an overcharge of freight on the 500 tons of No. 1 extra American iron from the furnace bank to the boat of $189, with which the plaintiff should be credited; and that the difference between the amount which the plaintiff agreed to pay for the English iron and the amount for which it was resold is $5,500, for which sum, less the $189, the defendants demand judgment, with interest.

As is apparent from what has been stated, the parties differ in some particulars upon the question as to what was the contract for the American or Copley iron. That contract is evidenced by certain letters which passed between them, and the first question for consideration is, What was the contract? As construed by the court, it was this: The defendants agreed in January, 1880, to sell and deliver to the plaintiff 500 tons of No. 1 extra American iron. The plaintiff was to pay $34 per ton for the iron, and was to give to the defendants his notes or acceptances for the purchase price, due in four months, bearing interest at six per cent. The iron was to be shipped as early in the spring as should be consistent with
111 cheap freights, to the National Exchange Bank of Milwaukee, which was to pay the plaintiff's acceptances on receipt of the bills of lading. The plaintiff was also to pay $1.00 per ton for conveying the iron from the furnace to the place of loading on boat, together with canal and lake freights. A question has arisen as to the place of delivery of the iron under the contract. I think that the iron was deliverable, under the contract, at the furnace bank, but the undisputed evidence shows that the defendants undertook to ship the iron, and did, in fact, cause it to be shipped at Elizabethport, N. J., and I hold upon this evidence, which consists of the correspondence between the parties and the bills of lading, that delivery of the iron was not, in fact, made to the plaintiff until it arrived at Elizabethport, and was placed upon canal boats.

This was the contract as it was consummated by the parties, and in this connection it is proper to observe that certain undisputed facts relating to performance of the contract have been established in the case which should be stated: 500 tons of iron intended for delivery to the plaintiff were manufactured at the furnaces of the Copley Iron Co., at Coplay, Penn. It was removed by cars from Coplay to Elizabethport, N. J. That quantity of iron was in April and May, 1880, placed on board canal boats at Elizabethport, consigned to account and order of Thomas J. Pope & Bro., care National Exchange Bank, Milwaukee, Wis. Bills of lading show-

112 ing receipt of the property from Thos. J. Pope & Co., and indorsed by them, were forwarded by the defendants, with the plaintiff's acceptances, to the National Exchange Bank, and the acceptances were paid before arrival of the iron in Milwaukee. In due time 500 tons of American iron covered by the bills of lading, and also by additional lake bills issued at Buffalo, arrived at the plaintiff's dock, and were unloaded and piled on his premises. The plaintiff paid the freight on the iron so received, and also paid to the defendants $1.00 per ton for conveying 500 tons of iron from the furnace to the place of loading on canal boats.

Now, it is claimed by the plaintiff that the iron which was delivered to him was not of the quality required by the contract, which was No. 1 extra iron; and this is the question in dispute, and upon which you are to pass. As I have said, the undertaking of the defendants included the shipment of the iron, and they made the shipment. The place of shipment was Elizabethport, N. J. That, therefore, was the place of delivery, and so the question is, Did the defendants ship to the plaintiff at Elizabethport the quality of iron called for by the contract, namely, No. 1 extra American iron? If they did, then they met the requirements of the contract. If they did not, then they are liable in this action.

I shall not recapitulate the evidence, nor comment upon
113 it. You have the testimony of the witnesses who were connected with the Coplay Iron Co., and who were engaged in the manufacture of the iron at the furnaces of that company. It is contended, in behalf of the defendants, that the iron there furnished to fill the contract of Pope & Bro. with the plaintiff was of a grade known as No. 1 extra iron; that it was forwarded from Coplay to Elizabethport, and that the testimony of the witnesses clearly shows such to have been the fact. On the other hand, it is claimed by the plaintiff that the iron in question was manufactured and piled on the furnace bank with large quantities of other iron of different grades, and that it was so transported to Elizabethport; and it is contended that the testimony of the Copley witnesses does not show that they had any knowledge of the grade of the particular iron furnished to Pope & Bro., to be by them delivered to the plaintiff. You have heard the testimony read, and, as bearing upon the question of the quality of the iron produced at the furnace and forwarded to Elizabethport, you will give to it such weight as you deem it entitled to.

You have also the testimony of witnesses who were examined at Elizabethport. Upon this testimony it is claimed, in behalf of the defendants, that the 500 tons of iron received from the furnace for shipment to the plaintiff were placed on board canal boats and were shipped; that the iron so shipped was No. 1 extra iron, such as the contract called for, and much reliance is placed upon the tes-
114 timony of the witnesses Hand & Hazard in support of and as establishing this conclusion. On the contrary, it is contended in behalf of the plaintiff that even if 500 tons of No. 1 extra iron were forwarded from the furnace to Elizabethport, to be shipped to the plaintiff, it was placed on the docks at the latter place with

other iron of other grades; that consequently confusion was liable to arise, and that the Elizabethport witnesses are not able, and do not, by their testimony, identify, from their personal knowledge, the iron placed on the canal boats as No. 1 extra iron. You will look into this testimony and take into consideration the methods of business in shipping iron at Hazard's dock, as they are shown by the testimony, and all the circumstances under which the shipments were made. You will consider whether, as the iron was situated, and as the business was done, a mistake was liable to occur, and finally give to the testimony which relates to the shipments such weight and effect as in your judgment it should have upon the question.

You have also the testimony of witnesses who examined the iron which was received by the plaintiff in Milwaukee and placed upon his premises. I think that testimony is competent and material, as bearing upon the question of the character and quality of the iron which was shipped at Elizabethport. I do not understand it to be seriously claimed that the American iron which was
115 received by the plaintiff here in Milwaukee was throughout of the quality called for by his contract with the defendants; and if it was not, and if it was the identical iron that the defendants shipped at Elizabethport, then there can be no doubt of the plaintiff's right to recover.

It has been said by the learned counsel for the defendants that if the iron that was shipped was No. 1 extra iron, the defendants were not, after the shipment, responsible for any possible changes or mixture of the iron with other iron happening in the course of transportation. That is true. If the defendants placed, or caused to be placed, on board canal boats at Elizabethport No. 1 extra American iron consigned under the bills of lading in evidence, their responsibility then ceased. In this connection you will consider whether there is any testimony in the case tending to show that any such changes or mixture of the iron in question with other iron, as have been suggested, occurred while the iron was in transit.

According to defendants' request, the court charges the jury that the burden of proof is upon the plaintiff to show that the iron which was delivered on the canal boats at Elizabethport, New Jersey, was not the iron called for by his contract with defendants.

Now, gentlemen, as I have said, the question for you to determine is, was the iron that was shipped by the defendants at Elizabethport, N. J., under the bills of lading No. 1 extra iron. If it was, then the defendants performed their contract, and the plaintiff
116 ought not to recover. If it was not, then the plaintiff should recover.

The contract between the parties included 300 tons of Scotch iron, but that iron is not here involved, and in the instructions I have given you you will understand that I have had sole reference to the American iron.

Proof has been made of the commencement of a suit in the State of New York by the present defendants against the Copley Iron Company on account of the iron in question, and the complaint

in that suit, made and sworn to by Mr. James E. Pope, has been read in evidence. That record, in connection with the testimony of Mr. Pope, was introduced as tending to show an admission on his part of the alleged inferior quality of the iron in question. In determining what weight, as an admission, that complaint should have, all its allegations should be taken into consideration, and the defendants in that connection are entitled to the benefit of the fact that their allegation in relation to the quality of the iron in question was made upon information and belief.

If the plaintiff is entitled to recover, the items of his demand are not disputed. They consist of—

First, the amount of the acceptance which he paid	$17,840 00
Second, the amount paid for freight	1,750 00
Third, the amount paid for unloading & piling	250 00
Fourth, storage of the iron on plaintiff's premises	184 00

117 In case of recovery, the plaintiff is entitled to interest on each of these items at 7 per cent. from the following dates, respectively:

On $17,840, from May 15, 1880.
On 1,750, from July 6, "
On 250, from Aug. 6, "
On 184, from Dec. 6, "

A computation which has been made and agreed to on this basis presents an aggregate of $22,315.40, and this is the sum which the jury may accept as the amount which the plaintiff has the right to recover, if entitled to recover at all.

The counter-claim set up by the defendants is admitted. It amounts to $5,311. The defendants are entitled to interest thereon at 6 per cent. from the 21st day of May, 1880. The total amount of the counter-claim, principal and interest, according to a computation agreed upon, is $5,802.29. So, gentlemen, if you find for the plaintiff, your verdict will be in his favor for $22,315.40 less $5,802.29, the balance being $16,513.11.

If you find the plaintiff not entitled to recover, then your verdict will be in favor of the defendants, against the plaintiff, for the sum of $5,802.29.

And because the above exceptions do not appear of record I, the judge who tried the above cause, have, at the request of the respective parties, hereunto set my hand and seal this 7th day of December, A. D. 1881.

CHAS. E. DYER, *Judge.* [SEAL.]

June 3, 1882. This day came the plaintiff, by his counsel, and, on his motion, it is ordered by the court that the marshal pay to him the proceeds of the sale of the iron attached and sold by him in this cause pursuant to the order of court, being the sum of eleven thousand one hundred and thirty-three dollars and one cent ($11,133.01), to be applied in part payment of the judgment herein.

118 July 11, 1882. This day came the defendants, by their attorneys, and filed their bond in the penalty of ten thousand dollars, with Benjamin F. Judson, Peter W. Gallaudet, and C. A. Pope as sureties, conditioned that said defendants shall prosecute a writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, which bond is approved by the district judge, and is as follows:

Supersedeas Bond.

Circuit Court of the United States, Eastern District of Wisconsin.

EDWARD P. ALLIS, Plaintiff,
against
THOMAS J. POPE and JAMES E. POPE, Defendants.

Know all men by these presents, that we, Thomas J. Pope, James E. Pope, Benjamin P. Judson, and Peter W. Gallaudet, of New York city, and C. A. Pope, of Jersey City, State of New Jersey, are held and firmly bound unto Edward P. Allis, of Milwaukee, Wisconsin, in the sum of ten thousand dollars, to be paid to the said Edward P. Allis, his executors or administrators.

To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these payments.

Sealed with our seals. Dated this 17th day of June, A. D. 1882.

119 Whereas the above-named Thomas J. Pope and James E. Pope are about to prosecute a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named Thomas J. Pope and James E. Pope shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THOS. J. POPE. [SEAL.]
JAMES E. POPE. [SEAL.]
B. F. JUDSON. [SEAL.]
P. W. GALLAUDET. [SEAL.]
C. A. POPE. [SEAL.]

Sealed and delivered in presence of—
WM. M. BRUCE.

STATE OF NEW YORK, }
City & County of New York, } ss:

Benjamin F. Judson, being duly sworn, deposes and says: That he is worth the sum of twenty thousand dollars over and above all his debts and expenses.

B. F. JUDSON.

Subscribed and sworn to before me, this 17th day of June, 1882.
[SEAL.] JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

Peter P. Gallaudet, being duly sworn, deposes and says: That he is the owner of the house and lot No. 10 East 53d street, New York city, between Fifth and Madison avenues, New York city, and also four lots of ground situated on the northerly side of West 70th
120 street, New York city, between 8th and 9th avenues, New York city, and that he is worth the sum of twenty thousand dollars over and above all his debts and exemptions.

P. W. GALLAUDET.

Subscribed & sworn to before me, this 17th day of June, 1882.
[SEAL.] JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

I hereby covenant and agree, for and in consideration of the sum one dollar, to me in hand paid by Edward P. Allis, the receipt whereof is hereby acknowledged, that my individual property shall be, and I hereby make my said individual property and my separate estate subject to and liable for the payment of the foregoing bond.

Witness my hand and seal, this 6th day of July, 1882.

C. A. POPE. [SEAL.]

In the presence of—
WM. M. BRUCE.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 6th day of July, 1882, before me personally came Benjamin F. Judson, Peter W. Gallaudet, and C. A. Pope, Thomas J. Pope, and James E. Pope, each to me known, and known to me to be the individuals described in and who executed the foregoing undertaking, and severally duly acknowledge that they executed the same; and the said C. A. Pope, upon a private examination by me separate and apart from her husband, acknowledged to me that she executed the said undertaking and the foregoing covenant, binding her separate estate freely and without any fear or com-
121 pulsion of or from her said husband.

WM. M. BRUCE,
Notary Public, N. Y. Co.

STATE OF NEW YORK, *City and County of New York:*

C. A. Pope, being duly sworn, deposes and says: That she is the owner of fifty-five lots of ground with buildings, stables, and outhouses thereon, situate on Prospect avenue, in the 23d ward of the city of New York, and that said property is worth at least thirty thousand dollars, and is free and clear of incumbrances, and is also the owner of the house and thirty lots of ground situated on the

corner of Storm and Summit avenues, Jersey City, State of New Jersey, which is worth at least twenty-five thousand dollars, and is free and clear of incumbrances, and that she is worth more than thirty thousand dollars over and above all her debts and exemptions, and that the title to the above property is in my name.

C. A. POPE.

Subscribed and sworn to before me, this sixth day of July, A. D. 1882.

JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

SOUTHERN DISTRICT OF NEW YORK:

I, John A. Shields, Esq., a commissioner of the circuit court of the United States for the southern district of New York, do hereby certify that I am personally acquainted with C. A. Pope, who signed the above bond as surety, and I am well satisfied from the foregoing affidavit that she is worth the sum in which she has qualified.

N. Y., July 6th, 1882.

[SEAL.] JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

122 SOUTH. DISTRICT OF NEW YORK, *ss:*

I, John A. Shields, Esq., a commissioner of the circuit court of the United States for the southern district of New York, do hereby certify that I am well acquainted with Benjamin T. Judson and Peter W. Gallaudet, who signed above bond as sureties, and I am well satisfied that they are each worth the sum in which they have severally qualified.

N. Y., June 17th, 1882.

[SEAL.] JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of John A. Shields, whose name is subscribed to the annexed affidavits & certificate, and that the signature to the same is in his proper handwriting; and I do further certify that he was, at the time of signing the same, a United States commissioner, duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court, this 17th day of June, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independance of the United States the hundred and sixth.

[SEAL.] J. M. DEUEL, *Clerk.*

(Endorsed:) July 11, 1882. Approved, Chas. E. Dyer, judge.

Whereupon it is ordered that execution be superseded, and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

123 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals, now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of record in the case of Edward P. Allis *vs.* Thomas J. Pope and James E. Pope.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th.

[SEAL.] EDWARD KURTZ, *Clerk.*

124 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Edward P. Allis, plaintiff, and Thomas J. Pope and James E. Pope, defendants, a manifest error hath happened, to the great damage of the said Thomas J. Pope and James E. Pope, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eleventh day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wis.

[Endorsed:] Filed July 11, 1882. Edw. Kurtz, clerk.

125 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] To Edward P. Allis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Thomas J. Pope and James E. Pope are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the said eastern district of Wisconsin, at the city of Oshkosh, in said district, this eleventh day of July A. D. 1882, and of our Independence the 107th.

CHAS. E. DYER, *Judge.*

We accept service of the above citation, this 8th day of September, A. D. 1882.

JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't in Error.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 293. Thomas J. Pope and James E. Pope, plaintiffs in error, *vs.* Edward P. Allis. Filed 3rd October, 1882.

115-363

Office Supreme Court U.S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 293.

THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR,

vs.

EDWARD P. ALLIS.

BRIEF FOR PLAINTIFFS IN ERROR.

WM. P. LYNDE,
Counsel for Plaintiffs in Error.

CRAMER, AIKENS & CRAMER, PRINTERS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 293.

THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR,

vs.

EDWARD P. ALLIS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This is a suit brought by Edward P. Allis against Thomas J. Pope and James E. Pope, copartners, doing business in the City of New York, under the firm name of Thomas J. Pope & Bro., defendants, to recover money paid for five hundred (500) tons of No. 1 extra American iron at the rate of thirty-four dollars ($34.00) per ton.

The complaint charges "that on or about the 7th day of January, 1880, said defendants agreed with this plaintiff to sell and deliver to this plaintiff, to be shipped to and delivered at the City of Milwaukee, after the opening of navigation then ensuing, five hundred tons of No. 1 extra iron, the same being a class of pig iron of a certain well known and recognized standard of quality, at thirty-four dollars per ton, to be paid for upon the receipt by this plaintiff of bills of lading of said iron, and *before the delivery of the same to this plaintiff;* this plaintiff also to pay the freight on said iron, and one dollar per ton for conveying the same from the furnace to the place of loading, and interest at the rate of six per cent. per annum for four months on said price of the iron."

"That pursuant to said agreement this plaintiff afterwards and on and about the 9th day of May, 1880, at the request of the defendants,

and upon the receipt of bills of lading of what purported to be the iron so contracted for, and before said iron had arrived in the City of Milwaukee, or this plaintiff had seen or had any opportunity to see or inspect the same, paid said defendant on account of said iron the sum of seventeen thousand eight hundred and forty dollars ($17,-840.00), being the price of said iron, with six per cent. interest thereon for four months, and one dollar per ton for carrying the same from the furnace to the place of loading or shipment; that afterwards, and on or about the 26th day of June, 1880, *and before the delivery of said iron to this plaintiff*, and before he had seen or had any opportunity to see or inspect the same, this plaintiff was obliged to pay and did pay the sum of seventeen hundred and fifty dollars ($1750.00) freight on the same, *and afterwards, on or about the 15th day of July, 1880, said iron was delivered to this plaintiff;* that this plaintiff thereupon inspected the same and found that the iron so shipped and delivered to this plaintiff, was not the quality of iron so as aforesaid purchased and contracted for, and this plaintiff alleges that the iron so to him shipped and delivered was not No. 1 extra iron, but in quality greatly inferior thereto, and not of the quality or standard of such iron or the iron he had purchased of or contracted for with said defendants, but greatly inferior thereto in value and quality; that this plaintiff therefore refused to accept and hath not accepted the same, but deposited the same on his premises, subject to the order and disposal of the defendants, of all which he immediately informed said defendants."

The defendants in their answer say: "They deny the allegations of said complaint commencing with the words, 'that on or about the 7th day of January, 1880,' and ending with the words, 'at the rate of six per cent. per annum for four months on said price of the iron,' and they allege that these defendants on or about the 7th day of January, 1880, agreed with the plaintiff to sell and deliver to him five hundred tons of No. 1 extra American iron at and for the price of thirty-four dollars per ton, to be delivered to said plaintiff free to cars at the furnace bank at Coplay, Lehigh County, Pennsylvania, to be paid for by plaintiff as the iron was delivered to cars at Coplay, aforesaid, by his promissory notes at four months, with interest added at the rate of six per cent. per annum, the plaintiff also to pay the freignt on said iron to Milwaukee, defendants agreeing that the freight on said iron from the furnace bank to place of loading on boats to be one dollar per ton." * * *

"Defendants further answering, deny the allegations of said complaint commencing with the words, 'that pursuant to said agreement' and ending with the words 'to place of loading or shipment.' But they admit that said plaintiff paid for said iron and the freight thereon from the furnace bank to place of loading before the same arrived at Milwaukee, by giving his promissory note at four months, with six per cent. interest added therefor."

"IV. Defendants further answering, deny that plaintiff paid any freight on said iron *before the delivery of said iron to him*, or before he had an opportunity to see or inspect the same."

"V. Defendants further answering, deny that they have any

knowledge or information sufficient to form a belief as to whether plaintiff was obliged to pay, and did pay the sum of seventeen hundred and fifty dollars or any sum for freight on said iron."

"VI. Defendants further answering, admit that the said iron was delivered to said plaintiff, and they deny that they have any knowledge or information sufficient to form a belief as to whether or not said iron arrived at Milwaukee on or about July 15, 1880, or that plaintiff inspected the same."

"VII. Defendants further answering, deny the allegations of said complaint, commencing with the words, 'and found that the iron,' and ending with the words, 'and hath not accepted the same.'

"VIII. Defendants further answering, deny that they have any knowledge or information sufficient to form a belief as to the allegations of said complaint, commencing with the words, 'but deposited the same,' and ending with the words, 'two hundred and fifty dollars.'

"Said defendants for a further, other, separate, and additional answer and defense to said complaint, allege:

"XV. That heretofore, to-wit, on or about the 7th day of January, 1880, said defendants agreed to sell and deliver to plaintiff at the furnace bank at Coplay, Lehigh County, Pennsylvania, free to the cars, between the 8th day of January, 1880, and the 30th day of April, 1880, five hundred tons No. 1 extra American iron at and for the agreed price of thirty-four dollars a ton, and for which plaintiff agreed to pay on delivery of said iron to cars at furnace bank at Coplay, aforesaid, by giving his promissory notes therefor at four months, with interest added at the rate of six per cent., and to pay the sum of one dollar per ton freight on said iron from the furnace bank to place of loading on board boat; that the time of the delivery of said iron was changed at the request of said plaintiff until 'as early in the spring as consistent with cheap freight.'"

"XVI. Defendants further answering say, that subsequently and in pursuance of said contract they delivered to said plaintiff on board the cars at the furnace bank at Coplay, aforesaid, 500 tons of pig iron."

"XVII. Said defendants further answering allege, that as they are informed and believe, said iron so delivered to said plaintiff as aforesaid, was No. 1 extra American iron, and was of the kind and quality required by said contract."

"XVIII. Said defendants further answering allege, that as they are informed and believe, said iron was justly and fairly worth at the time of the sale thereof to said plaintiff, the sum of thirty-four dollars per ton."

"XIX. Said defendants further answering allege, that they fully performed each and all of the covenants and conditions of said contract on their part to be kept and performed; and they say that said plaintiff paid for and received said iron; and they deny that plaintiff is entitled to the return of the money so paid by him therefor."

I have stated so much of the complaint and answer as may be material in disposing of the questions which arise on this appeal. It will be noticed that if the allegations of the complaint are true, that the property in this iron did not pass to the plaintiff until it was delivered to him at the City of Milwaukee, and the same was transported at the risk of the defendants. But if the allegations in the answer are true, the property passed to the plaintiff when the iron was delivered at the furnace bank free on board the cars, and the transportation was entirely at the risk of the plaintiff. The contract between the parties was made by telegram and letters, which were introduced in evidence at the trial and appear in the record in this case. The evidence so introduced on the part of the plaintiff, which showed that the place of delivery was at the furnace bank, and not at Milwaukee, as alleged in the complaint, was objected to by defendants' counsel as not proving or tending to prove the contract as alleged in the complaint, which objections were overruled by the Court, which rulings were duly excepted to by defendants' counsel. The evidence clearly shows that the iron was to be delivered to the plaintiff at the furnace bank at Coplay, Lehigh county, Pennsylvania, free to the cars. The plaintiff introduced evidence to show that the iron which was received by him at Milwaukee was not of the quality required by the contract; to all of which evidence defendants' counsel objected, until it should be shown or proposed to be shown by competent evidence that the said iron delivered in Milwaukee to said plaintiff was the same iron which had been delivered to plaintiff at Coplay, Pennsylvania, which said objections were overruled by said judge, and to which rulings defendants' counsel duly excepted.

Defendants' counsel also asked instructions from the Court, which the Court refused to give, which appear on pages 56 and 57 of the printed case, to each of which refusals defendants' counsel excepted.

ASSIGNMENT OF ERRORS.

1st. The Court erred in overruling the objections of defendants counsel embraced in exception 1, folio 41; exception 2, folio 42; exception 3, folio 43; exception 4, folio 44; exception 5, folio 45; exception 6, folio 45; exception 7, folio 46; exception 8, folio, 47; exception 9, folio 48; for the reason, that said letters did not prove or tend to prove the contract set forth in plaintiff's complaint.

2d. The Court erred in overruling the objections of the defendants' counsel embraced in exception No. 10, folio 50; exception 11, folios 50, 51; exception 12, folios 51, 52; exception 13, folio 53; exception 14, folios 55, 56; exception 15, folios 56, 57; for the reason that the plaintiff had not shown and had not proposed to show by competent evidence that the iron received by him from lake vessels was the same iron delivered to him under the contract on the furnace bank.

3d. The Court erred in overruling the objection of defendants' counsel to the reading in evidence the cross-examination contained

in the deposition of James E. Pope, for the reason that it was irrelevant, incompetent and immaterial to the issues at bar, whether a suit was pending between the said defendants, Thomas J. Pope and James E. Pope as plaintiffs, and the Coplay Iron Company as defendant; and because it appears affirmatively by the complaint in the suit of the said defendants as plaintiffs and the Coplay Iron Company as defendant, that the said defendant had never seen or examined the iron, and that all the allegations therein as to the quality of a certain lot of iron therein specified as purchased by the said defendants from the Coplay Iron Company, are stated on information and belief, are mere hearsay testimony. The judge ruled that evidence as to the pendency of a suit between said defendants as plaintiff, and the Coplay Iron Company as defendant, is relevant to the issue at bar, and that the complaint in the suit of said defendants as plaintiffs, and the Coplay Iron Company as defendant, was competent evidence. And the said judge did then and there overrule said objection, to which said ruling and decision the said defendants by their counsel, did then and there except. (See deposition read and complaint, folios 58, 59, 60 and 61 of record.)

4th. The Court erred in overruling the motion of defendants' counsel to strike out such portions of said complaint, and the allegations therein as made upon information and belief, for the reason that all allegations made upon information and belief are mere hearsay testimony, and because the information upon which said allegations are made, was derived from said plaintiff, E. P. Allis; which said motion was then and there objected to by said plaintiff, and said judge did then refuse to order said allegation stricken out; to which ruling and decision said defendants by their counsel did then and there except.

5th. The Court erred in overruling the objections of defendants' counsel embraced in exception 17, folio 79.

6th. The Court erred in refusing the first instruction in folio 103, for the reason that there was no evidence in the case on which a verdict for the plaintiff could be sustained. To which ruling defendants' counsel excepted.

7th. The Court erred in refusing the second instruction in folio 104, asked by defendants' counsel, which is as follows: "That they are not at liberty to disregard the evidence of credible witnesses, who testify positively to the facts within their own knowledge, and that there is no evidence in the case showing what the quality of the iron was which was delivered upon canal boats at Elizabethport, New Jersey, except that offered and read by defendants; the jury are not at liberty to disregard that evidence or to infer or guess or surmise that the iron delivered in Milwaukee was the same iron that was delivered at Elizabethport; that the burden of proof being on the plaintiff, the plaintiff must prove by competent evidence that the iron received in Milwaukee was the same iron that was shipped at Elizabethport." Which said instructions said judge did then and there refuse to give to the jury, and to which refusal said defendants by their counsel did then and there except.

8th. The Court erred in refusing to give the third instruction asked by defendants' counsel, which was as follows: "Third, that there is no presumption of law in this case and no presumption of fact that the iron delivered from lake vessels in Milwaukee was or is the same iron that was shipped in canal boats at Elizabethport." Which said instruction said judge did then and there refuse to give to the jury, and to which refusal said defendants by their counsel did then and there except.

9th. The Court erred in refusing to give the fourth instruction asked by defendants' counsel, which was as follows: "Fourth, that the undisputed evidence in this case is, that the iron delivered in Milwaukee was delivered in a mixed condition, Scotch iron and American iron being so mixed and intermingled that the plaintiff was compelled to and did separate them. That this is evidence tending to destroy a presumption that the iron delivered in Milwaukee was the same iron that was shipped at Elizabethport." Which said instruction said judge did then and there refuse to give the jury, and to which refusal said defendants by their counsel did then and there except.

10th. The Court erred in refusing to give the fifth instruction asked by defendants' counsel, which was as follows: "Fifth, that the sworn complaint of the defendants read in evdience is no evidence of any facts which are therein stated to be on information and belief." Which said instruction said judge did then and there refuse to give to the jury, and to which refusal the defendants by their counsel did then and there except.

11th. The Court erred in refusing to give the sixth instruction asked by defendants' counsel, which was as follows: "Sixth, that if the jury believe the evidence of the witnesses who testify on the part of the defendants, as to the quality of the iron that was delivered on the cars at the furnace bank, or into the canal boats at Elizabethport, New Jersey, and that the iron was of the quality testified to by said witnesses, then their verdict must be for the defendants." Which said instruction said judge did then and there refuse to give the jury, and to which refusal the defendants by their counsel did then and there except.

12th. The Court erred in refusing to give the seventh instruction asked by the defendants' counsel, which was as follows: "Seventh, that the plaintiff has not established by proof the contract stated, alleged and set forth in the complaint. That the evidence shows that the plaintiff was not to have the iron delivered to him at Milwaukee. That this is not a mere variance, but is such a failure of proof as will prevent a recovery in this case." Which said instruction said judge did then and there refuse to give to the jury, and to which refusal the defendants by their counsel did then and there except.

13th. The Court erred in refusing to give the eighth instruction asked for by defendants' counsel, which was as follows: "Eighth, that if they find from the evidence that the defendants delivered on board of canal boats at Elizabethport, New Jersey, five hundred

tons of No. 1 extra Coplay iron, and received therefor the bills of lading read in evidence and forwarded such bills of lading endorsed in blank to the National Bank, that from that time said iron was at the risk of the bank or its assigns, and not at all at the risk of defendants, and that from the time of such shipment and transfer of the bills of lading, the burden of proof is upon the plaintiff to show that the identical iron shipped on board of the canal boats was the same iron delivered in Milwaukee. And this fact must be shown by evidence; it cannot be found without evidence, and the mere fact that a quantity of iron is received by plaintiff from lake vessels under bills of lading, showing a shipment of Scotch and American iron all mixed up, is not of itself sufficient evidence or any legal evidence on which a jury can legally find that the iron delivered in Milwaukee was the same iron shipped on canal boats at Elizabethport. That the jury are instructed that the fact that the iron delivered from the lake vessels was all mixed up Scotch iron with American iron, raises the presumption that the iron delivered in Milwaukee was not the same iron delivered on the canal boats at Elizabethport." Which said instruction said judge did then and there refuse to give, except as given in general charge to the jury, and to which refusal to give said instruction without qualification, the said defendants by their counsel did then and there except.

ARGUMENT.

The first nine exceptions are to the rulings of the Court on the objections of defendants' counsel to the admission in evidence of certain letters as neither proving or tending to prove the contract as stated and set forth in plaintiff's complaint. The complaint states (folios 3 and 4), that on or about the 7th day of January, 1880, said defendants agreed, with this plaintiff to sell and deliver to this plaintiff, to be shipped to and delivered at the City of Milwaukee, after the opening of navigation then ensuing, 500 tons of No. 1 extra iron, the same being a class of pig iron of a certain well known and recognized standard quality, at thirty-four dollars per ton, to be paid for upon the receipt by this plaintiff of the bills of lading of said iron, and before the delivery of the same to the plaintiff, this plaintiff also to pay the freight on said iron, and one dollar per ton for conveying the same from the furnace to place of loading, and interest at the rate of six per cent. per annum for four months on said price of the iron. The letters offered, to which objection was made, showed that the iron was to be delivered at the furnace bank at Coplay free on board the cars. It is apparent that here is a material variance between the contract shown by the letters, and which was made by the parties, and the contract set forth in plaintiff's complaint. The complaint alleges that the place of the delivery of the iron was Milwaukee; the letters show that the contract was to deliver the iron at the furnace bank free on board the cars. The delivery of the iron, according to

the contract, passed the title to the property, and it thereafter was at the risk of the plaintiff; if lost, injured or stolen, it was plaintiff's loss, and not the defendants'.

On the 7th day of January, 1880, the defendants wrote to the plaintiff the following letter:

"NEW YORK, January 7th, 1880.

"To E. P. ALLIS & Co.

"We wired you to-day that we accepted your offer; 500 tons No. 1 ex. on furnace bank, $34.00; 300 tons No. 1 ex. Glengarnock, at 31½, in yard here; storage, 8c per ton per month. The iron to be met with your notes, bearing interest at six per cent. per annum, and at four months from this date; the iron to be paid for by the bank at shipping date, and to be held as collateral until the iron be so shipped. Please send to us the bank's agreement to do this, and we will at once send to you the invoices, the iron to be taken on opening of canals in May.

"THOMAS J. POPE & BRO."

On the 8th of January, 1880, defendants wrote the following letter to plaintiff:

"NEW YORK, Jan. 8th, 1880.

"To E. P. ALLIS & Co.

"The storage receipt will read for the Glengarnock as on the paper herewith; will be held here subject to the conditions of your notes, as stated therein. The No. 1 extra Lehigh we will give you an agreement to deliver the iron free to cars at the furnace bank at Coplay, Lehigh Co., Penna., between now and April 30th, at $34. Your notes to be the regular four months notes (adding interest) to the order of the cashier of the bank who shall agree to pay them as the iron is delivered to cars at Coplay for the No. 1 ex. Am., or to the boat at New York for the Glengarnock iron. This please attend to by the return mail and oblige yours, etc.

"THOS. J. POPE & BRO."

On the 10th of January, 1880, the plaintiffs wrote the following letter to defendants:

"MILWAUKEE, January 10, 1880.

"To THOMAS J. POPE & BRO.

"Yours of 7th received, and we hereby confirm the contract for 500 tons No. 1 ex. at 34, and 300 tons No. 1 ex. Glengarnock at 31½ on four months' time at six per cent annum, the 300 tons being subject to a storage charge of 8c per ton per month, shipment to be made as early in the spring as consistent with cheap freight to the National Exchange Bank, of Milwaukee, who will pay on receipt of B. L., as stated below. Upon receipt from you of notes and necessary papers confirmatory of above, we will execute and return them.

"E. P. ALLIS & CO."

"I hereby agree to receive from Thomas J. Pope & Bro., of New York, 800 tons of pig iron, and pay for the same on receipt of bills of lading for the iron consigned to the National Exchange Bank of Milwaukee, on the following terms, as per letter of Thomas J. Pope & Bro. to E. P. Allis & Co., Jan'y 7, 1880:"

"Say 500 tons (five hundred tons) No. 1. ex. furnace @ $34 per ton; 300 tons (three hundred tons) No. 1. Glengarnock @ $31.50 per ton; bills of lading to be sent directly to the bank and payment to be made promptly upon receipt of same; iron to be shipped early in May, 1880, on the opening of the canal.

"January 10, 1880. W. G. FITCH,

"*Cashier of National Exchange Bank, Milwaukee.*"

On the 22d of January, 1880, the plaintiffs wrote to the defendants the following letter:

"MILWAUKEE, Jan. 22, 1880.

"To THOMAS J. POPE & BRO.

"Enclosed we hand you acceptances:

December 31,	4 mos.....	$5,364.98
January 3,	4 mos.....	5,364.98
" 6,	4 mos.....	5,519.09
" 9,	4 mos.....	5,364.97
" 12,	4 mos.....	5,364.98
Total.....		$26,979.00

"To pay for 500 tons No. 1 ex. Coplay pig iron, deliverable free on cars at furnace (f't to New York not to exceed $1 per ton) at $34 per ton, and 300 tons No. 1 Glengarnock pig iron at 31½ per ton in yard, subject to 8c per ton per month storage, to the National Exchange Bank of Milwaukee. It is upon the opening of the canals in May, or as soon as consistent with cheap freights, who will pay the amount of said acceptances upon their receipt with the B. L. attached.

"E. P. ALLIS & CO."

On the 3d of February, 1880, W. G. Fitch, Cashier, wrote the following letter to the defendants:

"MILWAUKEE, Feb. 3, 1880.

"To THOMAS J. POPE & BRO.

"I have your letter of the 26th ult. I have arranged with Messrs. E. P. Allis & Co. to advance them the amt. of invoice of 800 tons of pig iron, purchased of you as per your letter of the 7th of January, 1880, and their acceptance of same Jan. 10, 1880. I to pay you as per my agreement of Jan. 10, 1880, for 500 tons at the rate of $34 per ton, and for 300 tons at the rate of $31.50 per ton, and in addition to this interest at six per cent. per annum for four months on the amount of the invoices. This item of interest should

have been made a part of my agreement to take the 800 tons of pig iron from you, under date Jan. 10, 1880, and I now amend that agreement to that effect. I shall want my title to the iron to come direct from you, and also the surrender of E. P. Allis & Co.'s acceptances given for the iron when I pay the amount of purchase money for the eight hundred tons of iron as above or *pro rata*. This is my understanding of the matter, and my agreement of Jan. 10, 1880, with the addition of the four months interest will be carried out.

"W. G. FITCH,
"*Cashier.*"

From these letters it is apparent that the property in this iron passed to the plaintiff on the delivery of the iron free to the cars at the furnace bank at Coplay, Lehigh Co., Penn. And the arrangement which was made for the shipment of the iron and the sending of the bills of lading to the National Exchange Bank of Milwaukee was entirely independent of the sale, and the defendants were acting in that matter under the direction and as the agents of the plaintiff, as the sale was completed on the delivery of the iron at the place designated in the contract.

Hatch *vs.* Oil Co., 100 U. S. Rep., 137.

That this was the understanding of the parties plainly appears from the telegrams and letters which passed between the plaintiff and defendant between April 6, 1880, and April 26th, 1880, inclusive, which were introduced in evidence and are set forth in the printed case on pages 39, 40, 41 and 42, by which it appears that Allis & Co. had under consideration the selling of this iron by the defendant before shipment.

This iron, before it was received in Milwaukee, was transported by rail to Elizabethport, New Jersey; there it is trans-shipped and placed on canal boats and transported to Buffalo, where it is thrown upon the dock, as appears by the bills of lading in this case, and from that point it is transported to Milwaukee in sail vessels or steamers. At all of these points of trans-shipment there is more or less liability of confusion of the iron, of its getting mingled with other iron, and of its being lost or stolen; this risk is entirely upon the purchaser. But if the allegations of the complaint are true, this liability is entirely upon the vendor.

The judge in his charge on page 59 says: "As is apparent from what has been stated, the parties differ in some particulars upon what was the contract for the American or Coplay iron; that contract is evidenced by certain letters which passed between them, and the first question for consideration is: What was the contract? As construed by the Court it was this: The defendants agreed in January, 1880, to sell and deliver to the plaintiff 500 tons No. 1 extra American iron. The plaintiff was to pay $34.00 for the iron, and was to give to the defendants his notes or acceptances for the purchase price, due in four months, bearing interest at six per cent. The iron was to be shipped as early in the spring as should be con-

sistent with cheap freight, to the National Exchange Bank, Milwaukee, which which was to pay the plaintiff's acceptances on receipt of the bills of lading; the plaintiff was also to pay one dollar per ton for conveying the iron from the furnace to the place of loading on boat, together with canal and lake freights. A question has arisen as to the delivery of the iron under the contract. I think the iron was deliverable under the contract at the furnace bank, but the undisputed evidence shows that the defendants undertook to ship the iron and did in fact cause it to be shipped at Elizabethport, New Jersey; and I hold upon this evidence, which consists of the correspondence between the parties and the bills of lading, that delivery of the iron was not in fact made to the plaintiff until it arrived at Elizabethport and was placed upon the canal boats."

The Court seems to be of the opinion that the undertaking on the part of the defendants to ship the iron and procure bills of lading therefor at Elizabethport changes the place of delivery from the furnace bank to Elizabethport.

We respectfully submit that the sale was complete when the iron was delivered at the furnace bank, and that the undertaking of the defendants to ship the iron had nothing whatever to do with the contract of sale; but in the construction which is given to the contract by the Court, the defendants were not responsible for the iron after it was delivered on board of the canal boats. The complaint sets forth an entirely different contract, involving very material legal liability, which would hold the defendants responsible for any mixture or loss of the iron before its delivery to the plaintiff in the City of Milwaukee. The contract is not set forth in substance and legal effect.

This Court has said, in Ferguson *vs.* Harwood, 7th Cranch., 408: "It will be recollected that this does not purport on the face of the declaration to be a description of a written instrument, nor the recital of a deed or record in *haec verba*. In respect to the latter, trifling variances have been deemed fatal; but as to the former, a more liberal rule has been adopted. In setting forth the material parts of a deed, or other written instruments, it is not necessary to do it in letters and words; it will be sufficient to state the substance and legal effect. *Whatever, however, is alleged, should be truly alleged; a contract substantially different in description or effect would not support the averment of the declaration.*"

We respectfully submit that the contract, as found by the Court, is substantially different in effect, and does not support the averments of the declaration.

When the contract was made, on the 7th of January, 1880, for the purchase of 500 tons of American iron, it was executory, but was converted into a complete bargain and sale by the appropriation of specific iron to the contract, and the delivery of the iron on the furnace bank, as the contract required, or by delivery of the iron free on board the cars at the furnace bank. It then became a completed sale, and the property in the iron passed to Allis & Co.

In Brown *vs.* Hare, 4 H. & N., 822, in Exchequer Chamber,

Earle, J., in giving the opinion, says: "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For answer the contract must be resorted to, and under that we think *the property passed when the goods were placed free on board, in performance of the contract.*"

In this class of cases the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. Here it passed by the act of the vendor alone.

In Campbell *vs.* The Mercy Docks, 14 Com. Bench (N. S.) 412, Earle, J., says: "It has been established by a long series of cases, of which it will be enough to refer to Hanson *vs.* Meyer, 6 East., 614; Rugg *vs.* Minett, 11 East., 210; and Rohdes *vs.* Thwaites, 6 B. & C., 688; that the purchaser of an unascertained portion of a large bulk acquires no property in any part until there has been a separation and an appropriation assented to by both vendor and vendee. Nothing passes until there has been an assent, express or implied, on part of the vendee. Benjamin, in his work on Sales, page 275, says, Willes, J., assented to this statement of the law and said, perhaps the case of Godts *vs.* Rose, 17 C. B., 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor. It may be either express or implied, and it may be given by an agent of the party, by the warehousemen or wharfinger, for instance."

On page 376 Benjamin says: "Care must be taken not to misconceive the true sense of these dicta; they do not mean that a subsequent assent by the buyer to the appropriation made by the vendor is necessary. Willes, J., states this plainly, and Earle, J., says there must be an assent of the vendee, express or implied; this assent is implied as shown by the language of Earle, J., himself, in Aldridge *vs.* Johnson, and in several of the cases already quoted, where, by the terms of the contract, the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do until an appropriation was made."

In this case, the contract required the defendants to deliver the iron free on board of the cars at the furnace bank. This was done, and this could not be done until the appropriation was made, and the assent of the vendee to the appropriation of the specific property is given by virtue of the contract.

In Hatch *vs.* Oil Co., 100 U. S. Rep., 132, Justice Clifford, in delivering the opinion of the Court, says: "Sales of goods not specified stand upon a different footing, the general rule being now, that no property in such goods passes until delivery, because until then the very goods sold are not ascertained. But where, by the contract itself, the vender appropriates to the vendee a specific chattel and the latter thereby agrees to take the same and pay the stipulated price, the parties, says Parke J., are thus in the same situation as they

would be after the delivery of goods under a general contract, for the reason the very appropriation of the chattels is equivalent to delivery by the vendor, and the assent of the vendee to take this specific chattel and to pay the price, is equivalent to his accepting possession." Dixon *vs.* Yates, 5 Barn. & Adol., 313, 340; Shep. Touchstone. On page 136 of this same case, Justice Clifford, says: "After an executory contract, has been made it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied." Benjamin on Sales, 2d edition 263; Rohde *vs.* Thwaites, 6 B. & C., 388. Examples of this kind are numerous in cases where the goods are not specified, and the decided cases show, that if the seller subsequently selects the goods, and the buyer adopts his acts, the contract, which before was a mere agreement, is converted into an actual sale, and the property passes to the buyer."

II.

The property in the iron passed to the plaintiff when the iron was delivered free on board the cars at the furnace bank. At Elizabethport the defendants, under instructions from plaintiff, and as his agents, shipped the iron on canal boats, and took the bills of lading set forth in the printed case, fols. 100–102; these bills of lading were sent by defendants to National Exchange Bank. On these canal boats the iron was transported to Buffalo, and there thrown upon the dock. How long it remained upon the dock we do not know; whether it was mixed with other iron on the dock, we do not know. Whether the schooners which afterwards received the iron, were wrongly directed, and took some other iron, we do not know; they were not acting for us, we could not hold them responsible for their acts, whether negligent or wilfully wrongful.

Plaintiff claims that the iron which those lake vessels delivered to him was not No. 1 extra American iron, such as the contract required. Defendants' counsel objected to the admission of that evidence until plaintiff had proved, or offered to prove, that it was the same iron which plaintiff received at place of delivery. The Court overruled the objection to the evidence, and the defendants' counsel excepted. Had the place of delivery been in Milwaukee, as alleged in the complaint the evidence would have been entirely competent. If the defendants had shipped the iron on the lake vessels, and had taken the bills of lading and forwarded them to the plaintiff, it might have been competent; but the defendants did not ship the iron on the lake vessels, the bills of lading of the vessels were not taken by them; they had shipped the iron on the canal boats, and were prepared to prove, and did prove, that the iron delivered by them and shipped on the canal boats, was No. 1 ex. American iron, according to the contract. We, therefore, insist that the evidence which was offered by plaintiff to show the quality of

the iron received from lake vessels, should not have been received until it had been proven, or the offer had been made to prove, that it was the same iron shipped by defendants on the canal boats at Elizabethport.

III.

What purtenancy the fact that the defendants had sued the Coplay Iron Company for not furnishing the quality of iron called for by their contract had to the issue in this suit, it is difficult to perceive. If it was sought to be used as an admission by defendants of the inferior quality of the iron furnished to the plaintiff, it appears that all of the allegations in their complaint as to the quality of the iron were upon information and belief, and James E. Pope testified that those allegations were made entirely upon information derived from E. P. Allis, the plaintiff in the present suit. Such allegations being hearsay evidence are incompetent, and should have been excluded. 2 B. & P., 547; 9 Clark & Finley, 780 and 784; 1 Phillips on Evidence, 4th Am. edition with Cowen & Hill's notes by Isaac Edwards, pages 420 and 421.

IV.

We asked the Court to instruct the jury "to return a verdict for the defendants," upon the ground that there was no evidence in the case sustaining the contract as it was set forth in the complaint, that the iron was to be delivered in Milwaukee.

2d. That there was no evidence that the iron received by plaintiff from lake vessels was the same iron delivered to plaintiff at the furnace bank free on board the cars, or the same that was shipped on the canal boats at Elizabethport, New Jersey.

3d. There was no legal evidence upon which a verdict for plantiff could be sustained.

V.

We were entitled to the instruction asked for and set out in our seventh assignment of errors. This Court has said in Manning *vs.* Insurance Co., 100 U. S., 697: "It is error to submit to a jury to find a fact of which there is no competent evidence." See also Lieb et al., *vs.* Henderson et al., 91 Ill., 282.

VI.

We were entitled to the instruction asked for and set out in our eighth assignment of errors. In Manning *vs.* Insurance Co., 100 U. S., 697, this Court say: "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the pre-

sumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes, are immediate inferences from facts proved. Remarking upon this subject, in United States *vs.* Ross, 97 U. S., 281, 284, we said whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed. Referring to the rule laid down in Starkie's Evidence, page 80, we added: It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principle and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences.—Best on Evidence, 95. A presumption which a jury may make is not a circumstance in proof, and is not, therefore, a legitimate foundation for a presumption. There is no open or visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass *vs.* Mitchell, 35 Pa. St., 440."

By the bills of lading of the lake vessels, found on pages 53 and 54 of this record, it appears that they received the iron which they delivered in Milwaukee from the dock in Buffalo. There is no proof that the iron on the dock was the same which defendant shipped some of it a month, and some six weeks previous, at Elizabethport. There is a memorandum at the bottom of these bills of lading of canal freight, and charges to and at Buffalo, with the names of canal boats, on some of which defendants had shipped iron at Elizabethport; also the names of other canal boats on which foreign iron was shipped. But as the iron was not trans-shipped from the boats to the vessels, and was received from the dock, where it may have lain for weeks, the memorandum containing the names of the canal boats is no evidence that the iron was the same delivered by the canal boats on the dock; it is a mere memorandum of the back charges which the vessels had to pay on the receipt of their cargoes. When the lake vessels took their cargoes it was undoubtedly represented to the masters that it was the same iron which had been received from these canal boats, and the canal boats' freight and charges to and at Buffalo were paid on such representations; but even that is not shown in the evidence. Will the Court presume, without evidence, that the iron which the defendants shipped on the canal boats at Elizabethport, a month or six weeks before, to be transported to Buffalo, and there forwarded to Milwaukee, was the same iron which these vessels received from the dock at Buffalo and delivered to the plaintiff in Milwaukee?

VII.

We have already, in this brief, discussed the grounds upon which we were entitled to the instructions asked and set forth in the ninth,

tenth, eleventh, twelfth and thirteenth assignments of error, and we do not think it necessary to add anything to what we have already said.

We respectfully submit that the judgment of the Court below should be reversed for the errors assigned.

WM. P. LYNDE,
Counsel for Plaintiffs in Error.

115-363

FILED
OCT 17 1885
JAMES H. MCKENNEY, Clerk

IN THE

Supreme Court of the United States.

October Term, 1885.—No. 34.

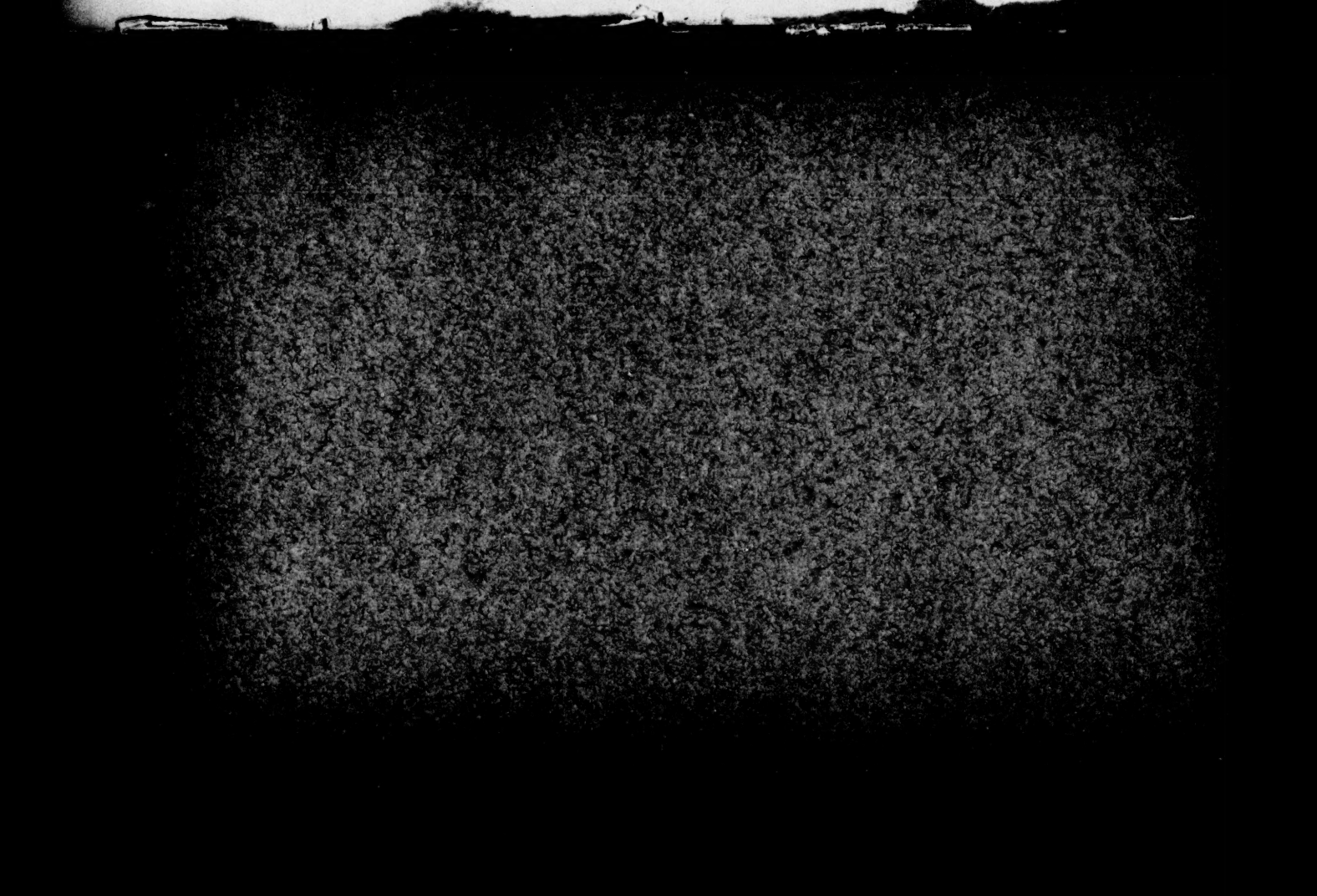
THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR,

vs.

EDWARD P. ALLIS, DEFENDANT IN ERROR.

GEORGE P. MILLER,
Of Counsel for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS.



IN THE

Supreme Court of the United States.

October Term, 1885.—No. 34.

THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR,

vs.

EDWARD P. ALLIS, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

In addition to the brief of the counsel for plaintiffs in error we desire only to call the attention of the court to a few points which have occurred to us to be important to a proper determination of this case:

I.—*Four hundred and forty tons of the iron in controversy were delivered to the defendant in error at the furnace bank, and sixty tons thereof at Elizabethport.*

The contract between the parties must be ascertained from the letters which passed between them. On January 7th, 1880, the plaintiffs in error wrote from New York the following letter to defendant in error (Record, p. 37, folio 66):

To E. P. ALLIS & Co.:

We wired you to-day that we accepted your offer—500 tons No. 1 Ex. on furnace bank at 34; 300 tons No. 1 Ex. Glengarnock, at 31½, in yard here; storage, 8 cents per ton per month—the iron to be sent with your notes, bearing in-

terest at 6 per cent per annum and at 4 months from this date; the iron to be paid for by the bank at shipping date, and to be held as collateral till the iron be so shipped. Please send to us the bank's agreement to do this, and we will at once send to you the invoices, the iron to be taken on opening canals in May.

THOS. J. POPE & BRO.

And on same page, and folio 67, the following answer is to be found:

MILWAUKEE, *Jan.* 10, 1880.

To THOS. J. POPE & BRO.

Yours of 7th received, and we hereby confirm the contract for 500 tons No. 1 Ex. at 34, and 300 tons No. 1 Ex. Glengarnock, at 31½, on four months time, at six per cent. per annum. * * * Shipment is to be made as early in the spring as consistent with cheap freight, to the National Exchange Bank of Milwaukee, who will pay on receipt of B. L., as stated below; upon receipt from you of notes and necessary papers confirmatory of above, we will execute and return them.

E. P. ALLIS & Co.

It appears (Record, folio 68,) that the defendant in error sent on January 22, 1880, to the plaintiffs in error, his five acceptances in payment of the iron.

By this contract the subject of the sale, in so far as it arises in this suit, was 500 tons No. 1, Ex. American iron, which was deliverable on the furnace bank. When the contract was entered into, in January, 1880, it was executory; but it became executed when the plaintiff in error appropriated particular iron to fulfil the terms of this contract. It appears from the testimony of James W. Weaver, who was connected with the Coply Iron Company (Record, folios 83 & 84), that the following No. 1 extra iron was shipped for Thos. J. Pope & Bro., to Hazard, at Elizabethport, and at the following dates:

Dec.	23, 1879	140	tons No. 1	extra
	24, 1879	40	"	"
Feb'y	13, 1880	20	"	"
April	24, 1880	50	"	"
	26, 1880	60	"	"
	27, 1880	40	"	"
	28, 1880	30	"	"
	29, 1880	50	"	"
	30, 1880	60	"	"
May	1, 1880	10	"	"
	4, 1880	30	"	"
	5, 1880	20	"	"
	8, 1880	30	"	"
	10, 1880	60	"	"
		640	"	"

And from the testimony of Fredrick Hand, who was in the employ of Hazard, at Elizabethport (record, folio 88), that of the 640 tons No. 1 extra iron so as aforesaid received at Elizabethport for Thos. J. Pope & Bro. the following portions thereof were shipped out at the following dates:

1880.	*Destination.*			
Jan'y 5.	New Haven	20	tons No. 1	X iron.
8.	"	50	"	"
14.	"	50	"	"
Mar. 15.	Providence	20	"	"
		140		

It appears from this that by March 15th, 1880, Hazard, at Elizabethport, had received from plaintiff in error—

Dec.	23, '79	140	tons No. 1	X iron.
	24, '79	40	"	"
Feb'y	13, '80	20	"	"
		200		

Of which 200 tons, 140 tons thereof had been already shipped out, so that from that date on Hazard held only 60 tons of

No. 1 extra iron for plaintiff in error until during the months of April and May he received the remaining 440 tons, which, together, made up the 500 tons of iron in controversy in this suit.

We have particularized so fully because in the two briefs of counsel for defendant in error (second point in original brief of defendant in error and page two of supplemental brief) we find it asserted that the iron in question was not separated from the larger bulk until it was carried on board canal boats at Elizabethport, when the contrary is the fact, to wit, by March 15, 1880, 60 tons were appropriated, and the remaining 440 tons were appropriated at the dates when the iron was delivered on board the cars at the furnace bank, to wit:

April	24, '80	50 tons.
	26,	60
	27,	40
	28,	30
	29,	50
	30,	60
May	1,	10
	4,	30
	5,	20
	8,	30
	10,	60
		440 tons.

That the iron was not then, in fact, appropriated cannot be seriously contended when taken in connection with the telegram of April 21, 1880, from plaintiffs in error to defendant in error, as follows: (Record, folio 74.)

To E. P. Allis & Co.

Your 500 tons 1 ex. Am. pig iron are now ready for shipment. We are looking for vessel by which to ship to Milwaukee.

Thos. J. Pope & Bro.

The contract in suit became executed when the particular

iron was, as aforesaid, appropriated. The iron then became the property of the defendant in error.

II.—*The iron in controversy was sold with warranty of quality.*

It was to be No. 1 extra American iron, and it has been held that words of that description upon a sale of personal property constitute a warranty that the property sold is of the quality described.

Hogins *vs.* Plympton, 11 Pickering, 97.
Henshaw *vs.* Robins, 9 Metcalf, 83.

To the same effect Lyon *vs.* Bertram, 20 Howard, 149. 153, where the following language is used:

"It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand."

And citing Henshaw *vs.* Robins *supra* with approval.

III.—*The purchaser of personal property upon breach of warranty of quality cannot rescind the contract of purchase and sale in the absence of fraud, and sue for the recovery of the purchase price.*

It is not necessary for us to point out the distinction between refusing to receive personal property when tendered on account of breach of contract of warranty of quality, and rescinding the sale, for a similar reason, after the title to the personal property has passed to the purchaser. If personal property is tendered upon an executory contract of purchase and sale, we have little doubt, although even that seems to be in dispute, (Lyon *vs.* Bertram, 20 Howard, 154), but that the purchaser can refuse to receive the property if the same is not as warranted. This is different from rescinding a contract which has become executed, and where the property has passed to the purchaser.

In Benjamin on Sales, Vol. I, page 546, § 623, (Fourth

American Edition by Corbin, published by F. D. Linn, Jersey City, 1883,) we find the following:

§ 623. "It was formerly held in England that the buyer of property warranted as to quality could avoid the contract for breach of the warranty. But modern decisions have restricted this remedy to cases where the warranty was fraudulent; that is, where the seller was aware of the defects against which he warranted and concealed them.

"On this subject the American courts have divided, a part holding that there can be no avoidance or rescission of the contract for mere breach of warranty without fraud, and the others holding that the buyer is entitled to property of the quality contracted for, and may return it and rescind the contract for breach of warranty, whether there was fraud or not on the part of the seller.

"The modern English rule has been approved in New York and Pennsylvania, and in an early case in the United States Supreme Court, and may perhaps be said to be sustained by the greater weight of authority."

We find (Benjamin on Sales, supra, § 624 to 634 inclusive,) that the courts in Texas, Vermont, Missouri, Minnesota, Georgia, Connecticut, Kentucky and North Carolina have followed the modern English rule and agree with this court and the courts of New York and Pennsylvania that the purchaser cannot rescind a contract of purchase and sale for breach of warranty of quality in the absence of fraud.

The courts of Massachusetts, Maine, Maryland, Wisconsin, Illinois, Iowa, South Carolina, Ohio, Alabama, Arkansas, and Indiana take the opposite view, and hold that the contract can be rescinded for breach of warranty, with or without fraud.

Benjamin on Sales, *ibidem.*

As this question has been decided in this court it is not necessary to discuss the question as to which courts have adopted, as an original proposition, the better law. In this court the question is settled.

Thornton *vs.* Wynn, 12 Wheaton, 183.

Lynn *vs.* Bertram, 20 Howard, 149.

In Thornton *vs.* Wynn suit was brought on a note given upon the purchase of a horse with warranty of quality. The defense was that the purchaser upon discovering that the horse was unsound and not as warranted, offered to return him. The court upon the trial charged the jury "that if they should be of the opinion from the said evidence that the said horse was, at the time of the said sale, utterly unsound and broken down, * * * and was wholly unfit and incapable of the action and fatigue necessary to a race horse, *but that the said facts were not known to the plaintiff at the time of the said sale*, the said facts are not a sufficient defense in this action to prevent the plaintiff from recovering."

This court through Mr. Justice Washington, after reviewing the English authorities, held that the instruction was correct, and announced the rule to be: (Page 193 of Decision.)

"But if the sale be absolute, and there be no subsequent agreement of the vendor to take back the article, the contract remains open, *and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within an reasonable time.*"

In other words, the purchaser cannot, for breach of warranty, rescind and return the property unless the settler consents to it, except for fraud on the part of the seller.

In Lyon *vs.* Bertram, *supra*, plaintiff sold, on January 13, 1857, 2,000 barrels of "Haxall" flour, then being in the barque Ork, to the defendant. On January 25th fifty barrels were delivered upon the order of the defendant to a person to whom he had sold the same, and it was paid for, and on January 29th fifty barrels to another person upon a similar order of the defendant. Thereupon, on January 31st, the defendant discovered that the flour in question was not "Haxall" flour at all, but "Gallego," and refused to receive the remainder of the cargo.

Mr. Justice Campbell, in delivering the opinion of the Court, says, page 153:

"The defendant does not resist the fulfilment of his agreement for any fraud, nor does the verdict impute any *mala fides* to the plaintiffs."

* * * * * *

"It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand, *and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand.*"

Page 154: "But it cannot be admitted that the purchaser was entitled to abandon this contract." The decision follows the case of Thornton *vs.* Wynn, and holds that the purchaser cannot rescind the contract, and especially not after he had received and sold the one hundred barrels, and that the remedy of a purchaser upon breach of contract of warranty is suit for damages and not a return of the property.

In the case at bar we have seen that the place of delivery was the furnace bank and that the title to the iron in question passed to the defendant in error when the same was separated from the bulk and appropriated to fulfill the contract in suit. No fraud or *mala fides* is charged against the plaintiffs in error, and there is no pretense that they knew when they delivered the iron that it was not No. 1 extra iron.

The learned counsel for the defendant in error say (second point in original brief and page two of supplemental brief) that the title to the iron passed when the same was loaded into the canal-boats at Elizabethport. Were that so, then the defendant in error had no right under the authorities above referred to to declare the contract rescinded. His remedy was to bring suit for breach of warranty, and in such a suit he might recover the difference in the value of the property delivered to him and what its value would have been had it been as warranted.

The defendant in error attempted to rescind the contract,

and brought his suit for a ~~remedy~~ return of the purchase price, At the close of the evidence, when these facts appeared to the court, and that accordingly the defendant had mistaken his remedy, the plaintiffs in error moved the trial judge to instruct the jury to return a verdict for the defendants (plaintiffs in error), which instruction the said judge refused to give, and the plaintiffs in error excepted. (Record, page 56, folio 103.)

If we are right in our interpretation of the law, this instruction should have been given, and its rejection was error.

IV.—*In any aspect of the case the attempted rescission of the contract on July 15th, 1880, was not within a reasonable time.*

We have shown above that the contract became executed when the iron was appropriated by the plaintiffs in error to fulfil the contract in suit, and that the title to the iron then passed to the defendant in error. On January 22, 1880 (Record, folio 48), defendant in error sent his acceptances to the plaintiffs in error in payment of the iron, which acceptances (Record, folio 48) were paid between May 3d and May 17th, 1880, after the shipment of the iron. On April 9, 1880 (Record, folio 70), the defendant in error sent the following telegram:

"To Thomas J. Pope & Bro.:

"For what price can you sell our five hundred tons American? Answer.

"E. P. Allis & Co."

And in record, pages 40 and 41, folios 70 to 74, we find the correspondence between the parties as to a sale of the iron by the defendant in error and his opinions as to the rate of freight he should pay. On April 21, 1880 (Record, folio 74), the plaintiffs in error notified the defendant in error by telegraph that his 500 tons No. 1 extra iron were ready for shipment, and that they were looking for a vessel

by which to ship to Milwaukee. The defendant in error paid the freight on the iron from the furnace banks to Elizabethport at the rate of $1 per ton.

After the title to the iron passed to the defendant in error he caused the same to be shipped, between April 28 and May 12, 1880 (Record, folio 89), by canal boats to Buffalo, New York, and on June 9 and 15th, 1880 (Record, folios 98 and 99), to be shipped on schooners from Buffalo to Milwaukee, and that it arrived in Milwaukee on July 15th, 1880 (Record, folios 4 and 5). After its arrival in Milwaukee the defendant in error gave notice of the rescission of the contract.

There can be no question but that the defendant in error had ample opportunity to inspect the iron at the place of delivery. He was informed by telegraph that his iron was ready for delivery. He had contracted that the place of delivery should be the furnace bank. He neglected to avail himself of his right and opportunity to inspect the iron at its place of delivery, but exercises his right of property over it, and causes it to be shipped and carried to a distant city, 1,000 miles away from the place of delivery, and after its receipt there, eight to ten weeks after its actual delivery to him, gives notice that the iron is not as warranted, and that he elects to rescind the contract, and that he has deposited the iron, for the benefit of the plaintiffs in error, at a specified place in that distant locality.

If the case at bar had been a proper case for a rescission, then, under the authorities, such rescission should have been made within a reasonable time, and when the seller could be put in *statu quo*.

Thornton *vs.* Wynn, 12 Wheaton, 184.

Lyon *vs.* Bertram, 20 Howard, 149–155.

In the latter case eighteen days were held an unreasonable time.

If the defendant in error had had the right to rescind

the contract, can it be claimed that, after he has neglected to inspect the iron at its place of delivery, and after the long delay of ten weeks, and after he has exercised his right of property over it by carrying it to a far-distant city, and thus making it impossible to place the seller in *statu quo*, that a notice of a rescission of the contract would be reasonable, or within a reasonable time? We think not. If the defendant had had a right to rescind the contract, his rescission should have been made within a reasonable time and at the place of delivery, and not one thousand miles away. Suppose the price of iron had fallen during those ten weeks, would a rescission, after the long delay, have been reasonable? We think not.

If we are right in this, our request to instruct the jury to return a verdict for the defendants (Record, folio 103, page 56) should have been granted, and its refusal was error.

We respectfully submit for the errors assigned the judgment of the court below should be reversed.

GEORGE P. MILLER,
Of Counsel for Plaintiffs in Error.

115-363

IN THE

Supreme Court of the United States.

THOMAS J. POPE, AND ANOTHER PLAINTIFFS IN ERROR,

vs

EDWARD P. ALLIS, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

EPPA HUNTON.
JEFF CHANDLER.
Atty's for Def't in Error.

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Supreme Court of the United States.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

There can be no doubt from the evidence that the Judge who presided at the trial in the court below, stated the contract between the parties correctly in his charge to the jury as follows: "The defendant agreed in January, 1880, to sell and deliver to the plaintiff 500 tons of No. 1 extra American iron. The plaintiff was to pay $34 per ton for the iron * * * The iron was to be shipped as early in the spring as should be consistent with cheap freight, to the Nat'l Exchange Bank of Milwaukee, which was to pay the plaintiff's acceptances on receipt of the bill of lading * * * I think the iron was deliverable under the contract at the Furnace Bank, but the undisputed evidence shows that the defendant undertook to ship the iron, and did in fact cause it to be shipped at Elizabethport New Jersey and I hold upon this evidence * * * that delivery of the iron was not in fact made to the plaintiff until it arrived at Elizabethport and was placed on the canal boat.

It is very certain from the testimony that if the plaintiff in error had delivered this iron at the Furnace Bank and left it there, they would not have complied with their contract, they were bound by their contract to put it aboard the canal boats at Elizabethport, for the bank was to pay only on receipt of bills of lading and the bills were given to the plaintiffs in error and could only be given when shipped at Elizabethport.

If the iron in quality as sold had been delivered at the Furnace Bank and other iron of inferior quality had been shipped by the plaintiff in error at Elizabethport they would have violated their contract in the same way as if they had delivered the inferior article at the Furnace bank; it was their duty under their contract to deliver the same iron on the canal boat.

Besides the evidence discloses that the plaintiff in error received large quantities of iron from the Coplay furnace which was delivered to Hazard at Elizabethport and that the iron shipped to the defendant in error was not separated from the larger bulk till it was carried on board the canal boats at Elizabethport.

The iron was delivered on the cars in large quantity, more than was sold to defendant in error, and the exact quantity was not appropriated to him till delivery on canal boats. All authorities agree that property does not pass to the vendee until all that is necessary has been done by vendor to segregate the property sold from other property of vendor.

1st Chitty on contract, (11th edition) page 524, lays down doctrine as follows: "where goods part of an entire bulk are sold, the contract is incomplete and no property passes if such part has not been distinguished or separat-

ed from the bulk." The Boston & Lowell R. R. Co., vs. Claflin, 7th. Allen, 314. It appeared that there was a bargain for two thousand telegraph poles and the seller had at the time and place of delivery two thousand one hundred and thirty poles. He notified the purchaser he was ready to deliver them and receive the price; to which purchaser made reply, admitting that the seller had the poles and promised to settle for them soon, but before anything else was done, the poles were carried away by a freshet. It was held on the ground that the separation had not been made that the title to them had not vested. See also.

Merrill vs. Hunnewell 13th Pick 213, 2nd Kent 496. Authorities can be multiplied indefinitely on this point.

It will be seen by the deposition of James W. Weaver page 46 of printed record, and of Fred'k Hand, page 48, that iron was shipped to Hazard at Elizabethport, for Thomas J. Pope & Bro., more than was purchased by def't. in error and it will further appear from deposition of said Hand, that the iron sold to Allis was not separated from larger quantity till loaded on the canal boats, and consigned to Milwaukee.

Within all the authorities the property in the iron did not vest in Allis till separated by delivery on canal boats. So that we must look to the iron delivered on board canal boats, and which was the same delivered in Milwaukee, to ascertain whether the quality of the iron thus delivered corresponded in quality with the iron sold.

The contract set out in the complaint provides for a delivery of the iron at the city of Milwaukee, and it is claimed that the evidence to show contract to deliver at Furnace bank, or on canal boats at Elizabethport, was inadmissible, because the *allegata* and *probata* did not cor-

respond. The first nine exceptions by plaintiff in error were taken upon the ruling of the court admitting this testimony. Whatever may have been the value of these exceptions at Common Law, we must look to the statute of Wisconsin for the law.

The Revised Statues of that state in §2669 provide, "No variance between the allegations in pleading and the proof shall be deemed material unless it shall *actually mislead* the adverse party to his prejudice in maintaining his action or defence on its merits; whenever it shall be alleged that a party has been so mislead, the fact shall be proved to the satisfaction of the court in what respect he has been mislead, and thereupon the court may order the pleading to be amended upon such terms as may be just."

There was no suggestion or proof at the trial that the plaintiff in error had been mislead. The variance was properly regarded as immaterial under the statute.

The plaintiffs in error could not have been mislead because their answer already filed was applicable to the real cause of action.

Bonner vs. Home Ins. Co. 13 Wisconsin 677, was an action on Fire Policy; the complaint set forth the contract of Insurance, but omitted to state the conditions in the policy. Held; that it did not appear that such variance actually misled the def't to its prejudice, especially as it had already filed an answer applicable to the real cause of action.

Leopold vs. Van Kirk 30 Wis. 553.

Complaint was for breach of warranty of "cured and pickled hams" sold by def't. to plaintiff. Proof was sale of "fresh packed hams." Held this variance was properly disregarded.

In this case the defendant in court below was represented by same counsel who appear for plaintiffs in e

ror here. In Leopold vs. Van Kirk, counsel for defendant in court below, asked the court to instruct the jury that plaintiff must prove the contract as alleged in his complaint. This was refused, and this ruling of the court below was one of the errors assigned in appellate court.

Dixon, Ch. J., in delivering the unanimous opinion of the court on page 553, said: "The objection that there was a variance between the allegations of the complaint and the proof growing out of what is understood by persons engaged in the trade as the difference between cured hams and fresh packed ones is too technical to merit consideration. If there was such variance the defendants were not misled by it, and was just one of the kind which statute declares shall not be material.

See, also, Giffert vs. West, 33 Wis., 617.

This seems to be a complete answer to the first nine exceptions embraced in the first assignment of errors in brief for the plaintiffs in error.

The third and fourth errors assigned are, because the court allowed the defendant in error to read the cross-examination of the plaintiffs in error.

In this cross-examination one of the plaintiffs in error disclosed the fact that after the defendant in error had refused to take the iron received at Milwaukee, *and after they had sent an agent, Wm. B. Bromnell, to Milwaukee to examine it,* they sued the Coplay Furnace Co., and filed a copy of their verified complaint against Coplay Furnace Co. in this suit.

Was this error? It is urged that it was not admissible testimony against the plaintiffs in error, because the portion of said complaint relied on, was stated on information derived from defendant in error. This is a

mistake. It is stated on information *and belief*, and the information was derived from the defendant in error, and from their agent whom they sent to Milwaukee "*to examine the iron shipped to Allis and report to us its quality.*" The information and belief was derived in part, at least, from their own agent, whose examination and report received before the suit was brought bound them as closely as if made by themselves and any declarations made by them after such examination and report was as admissible as if the report and examinations had been made by one of them. But no case can be found in which the complaint filed and sworn to on information *and belief, no matter how obtained,* has been ruled out as inadmissible testimony against the party making it.

In addition to the authorities cited in the brief filed by Messrs Jenkins, Winkles and Smith, reference is made to the following.

1 Greenleaf on evidence, 13th edition § 527 a.

"A record may also be admitted in evidence in favor of a stranger against one of the parties as containing a *solemn admission* or judicial declaration by such party in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions to which class of evidence it properly belongs".

Tiley vs Crowley, 1 Ld, Raymond, 744.

Parsons vs Copeland, 33 Maine, 370.

In this last case the doctrine was held. "The allegations of a former writ in which the present defendant had removed judgement as plaintiff may be used as evidence of his admission, although the present plaintiff was neither party nor privy to such suit. Such allegations

may be shown by introducing the record of the former suit."

Cook vs Barr, 44 N. Y. Rept., 156.

"The admissions of a party to a civil action are always competent evidence against him and it matters not when, where or to whom they are made.

"The rule applies to a pleading of such parties though in another action and with other parties, if it be shown that the admissions were inserted in such pleading with his knowledge and sanction or by his directions."

Week's Law of Deposition, § 518.

If we have been shown that the assignment of error Nos. 8 and 4 are not well taken and that there was no error in admitting the deposition of one of the plaintiffs in error, then there is evidence at least tending to show that the iron received at Milwaukee from lake vessels was the same iron delivered under the contract at the Furnace bank or on board the canal boat at Elizabethport and therefore.

The second assignment of errors embracing exceptions 10 to 15 both inclusive is not sustained.

These exceptions were taken to the introduction of testimony as to the quality of the iron landed at Milwaukee from the lake vessels. But without the admission of the plaintiff in error contained in the suit against the Coplay Iron Company, it seems to us there was abundant evidence tending to show the iron shipped and the iron landed at Milwaukee was one and the same. The plaintiff's are obliged to admit they shipped the iron on the the canal boats at Elizabethport and obtained bills of lading for Milwaukee. There was no other iron shipment except that sent to defendant in error, consisting of the iron in dispute and 300 tons of Scotch iron. There

was no other iron landed, all that was landed was the Coplay iron and the Scotch iron. There is no evidence tending to prove the introduction of any other iron on the route. Surely this was enough to authorize the conclusion that it was the same iron. The quantity received, was the exact quantity shipped, as to both kinds of iron. The idea that there was any change in the iron on the route was never entertained by plaintiff's in error till the trial of this case in the court below; certainly not until after the institution of their suit against the Coplay Iron Co.,

The fifth assignment of error is for overruling exceptions 17, folio 44, printed Record.

This point is identical with the point involved in 2nd assignment of errors and need not be further noticed.

The other assignment of errors embrace the refusal of the court to grant the eight instruction asked for by the plaintiffs in error which will be noticed and replied to in their order.

1st. Instruction. To return a verdict for defendant.

The court was obliged to refuse this instruction because it pre-supposed there was no evidence tending to prove the plaintiff's case. It was impossible for the judge who presided at the trial and heard all the evidence to grant such an instruction.

2d. Instruction is based on the idea that there is no evidence on behalf of defendant in error of the quality of the iron delivered on the canal boats at Elizabethport and that the witnesses for the plaintiffs in error testify positively to facts within their knowledge and proved it was of the quality provided for in the contract. We maintain there is sufficient evidence to justify the verdict in the fact that the presumption arises that the iron loaded on the canal boats and shipped to Milwaukee and

delivered at Milwaukee under the bill of lading taken by the plaintiff's in error was the identical iron shipped at Elizabethport. It was not seriously disputed that the iron landed at Milwaukee was inferior to grade contracted for,

It is a mistake to say that the witnesses examined for plaintiff's in error testified to facts within their knowledge. When cross-examined they admitted they spoke from what others told them.

When the admission of plaintiff's in error contained in their suit against the Coplay Iron Co., is added to the presumption above referred to, we think the great preponderance of evidence is on side of defendant in error and commanded the verdict that was given.

3d. Instruction has already been answered in what has been said of 2d. Instruction.

4th. Instruction That the evidence that Scotch and American iron when delivered in Milwaukee was mixed together tended to destroy the presumption that the iron delivered in Milwaukee was the same iron shipped at Elizabeth port.

We argue that there was only American and Scotch iron shipped at Elizabethport, and only the same two kinds of iron delivered at Milwaukee, in the exact proportions shipped, is strong evidence tending to prove that the iron delivered in Milwaukee, was the same shipped at Elizabethport, although the two different irons had become mixed on the route. It shows that no other iron than the two were mixed with them on the route. The instruction was properly refused.

5th. Instruction has heretofore been commented on and must have been refused.

6th. Instruction was refused because the witnesses who testified on behalf of plaintiffs in error as to the quality of the iron shipped, did not testify of their knowledge but of their information derived from others.

7th. Instruction relates to variance between the *allegata* and *probata*, and has already been discussed.

8th. Instruction, asks the court to instruct the jury that the fact that the iron delivered at Milwaukee, was mixed Scotch and American iron, raises the presumption that the iron delivered at Milwaukee was not the iron shipped on the canal boats at Elizabethport.

This does not raise any such presumption, and if it did it was for the jury to find such presumption. and not for court to declare it.

After the judge had refused these instructions, he charged the jury. His charge will be found on pages 57 to 62, both inclusive, of the printed record

This charge is eminently fair and states the evidence and law with great force and precision.

The court properly allowed all the evidence on both sides to go to the jury.

The jury found a verdict thereon and as there was no motion to set aside the verdict, it must stand, provided the rulings of the court were correct, and this we have endeavored to show.

Respectfully submitted

EPPA HUNTON.

JEFF CHANDLER.

Atty's for Def't in Error.

115-363

OFFICE SUPREME COURT U. S.
FILED
APR 25 1885
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

THOMAS J. POPE, ET AL.,
Plaintiffs in Error,

vs.

EDWARD P. ALLIS,
Defendant in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JENKINS, WINKLER & SMITH,
Counsel.

HIGH, LUSTON & POOLE, PRINTERS.

SUPREME COURT OF THE UNITED STATES.

THOMAS J. POPE, EL AL.,
Plaintiffs in Error,

vs.

EDWARD P. ALLIS,
Defendant in Error.

The facts of this case are mostly undisputed. They are stated with precision in the charge of the Court to the jury. *No part of the charge is excepted to.*

The defendant in error, Allis, sues the plaintiffs in error for the price he paid them, before delivery, for 500 tons of No. 1 extra American iron which they had contracted to deliver to him, claiming that the iron tendered in discharge of the contract, and which he refused to accept, was of inferior quality.

By the terms of the contract the Popes had the *right* to make delivery of the iron at the place of manufacture "on the furnace bank." But they made no attempt to do so. They received from the Coplay furnace during the winter of 1880 far more than 500 tons of iron, and sent it to Mr. Hazard's yard at Elizabethport, where it is piled, and from there shipped 500 tons to Mr. Allis. There was no separation or setting apart of the iron sent from other iron until it was loaded on canal boats consigned to Mr. Allis. *To ship* the iron was part of the plaintiffs in error's contract.

It is an undisputed fact that Mr. Allis had also purchased of the Popes 300 tons of Scotch iron which were shipped at the same time, and were forwarded from Buffalo in the same vessels with the American iron. (See the two bills of lading, record p. 53.)

We proved the arrival of the 800 tons in Milwaukee by the testimony of Mr. Charles Allis. Record p.p. 27–28.

We proved that the 500 tons of American iron contained in it were not extra No. 1, "*and the said defendants, by their counsel, did then and there admit that they would call no witness to testify that the quality of said lot of iron received by said plaintiff from lake vessels was No. 1 extra American iron and not an iron of inferior quality.*" Record p. 30.

That Allis refused to accept the iron and left it subject to the order of Pope & Bro. was not disputed at the trial. It was scarcely controverted in the answer. It was conclusively proven by the statement of plaintiffs in error in their complaint against the Coplay Iron Company, limited, viz.: "8. That their said customer (Edward P. Allis) refused to accept and has not accepted said iron." Record p. 34.

So that the only question which was open and litigated at the trial was whether the 500 tons of American iron, which arrived at Milwaukee, were the 500 tons which Pope & Bro. loaded on the canal boats at Elizabethport. They came in the ordinary course of transportation. *Prima facie* they were certainly the same. There was really no evidence to the contrary, and we thought we were entitled to a direction of a verdict in our favor. But the Court left the question to the jury, concluding a lucid statement of the case as follows:

"The question for you to determine is, was the iron that was shipped by the defendants at Elizabethport, N. J., under the bills of lading No. 1 extra iron? If it was, then the defendants performed their contract and the plaintiff ought not to recover. If it was not, the plaintiff should recover."

As we have stated, there was no exception to this or any other portion of the charge. The jury found in favor of the plaintiff below, and there was ample evidence to sustain the verdict.

It remains to us to notice the several points made by the brief filed for plaintiffs in error, and we will do so in the order they are there presented.

I.

It is claimed that there is a variance between the proofs and the allegations of the complaint.

The complaint alleges that the iron was to be delivered at Milwaukee. The contract as made by the correspondence was for iron at the furnace bank, but was to be *shipped* to Milwaukee by plaintiffs in error. To the extent of this discrepancy there was a variance. The Revised Statutes of Wisconsin provide:

"§2669. No variance between the allegations in a pleading and the proof shall be deemed material, unless it shall *actually mislead* the adverse party to his prejudice in maintaining his action or defense upon its merits. Whenever it shall be alleged that a party has been so misled, the fact shall be *proved to the satisfaction of the Court* in what respect he has been misled, and thereupon the Court may order the pleading to be amended upon such terms as may be just."

Of course there was and could be no suggestion, much less *proof*, at the trial, that the plaintiff in error had been in any way misled. Hence the variance was properly disregarded as immaterial.

II.

Counsel says: "*The property in the iron passed to the plaintiff when the iron was delivered free on board the cars at the furnace bank.*"

This statement contains an *error of fact* which runs all through the brief submitted on behalf of the plaintiffs in error. Thus it is said on page 11, "We respectfully submit that the sale was complete *when the iron was delivered on the furnace bank*," and again, "When the contract was made on the 7th of January, 1880, for the purchase of 500 tons of American iron, it was executory, but was converted into a complete bargain and sale by *the appropriation of specific iron* to the contract * * on the furnace bank."

This is based on the *supposition* that the contract was carried out literally as made. But it was not. There was a *variance* in the case long prior to that, between the allegation and the proof. The defendants might have delivered the iron on the furnace bank. But they were also to ship it. If they *shipped* the proper iron it was of no importance to the plaintiff whether it had been previously appropriated to him or not. He left it to the defendants to do as they pleased in that respect. Now, the evidence was clear and uncontradicted (it all came from the defendants) that there was no delivery, no "appropriation of specific iron" to this contract, until it was loaded on five canal boats between April 30th and May 12th on its way to Milwaukee.

It appears that the Coplay Iron Co., during the winter of 1879–80, shipped to Pope & Bro. large quantities of its iron. Eight hundred sixty-nine (869) tons of it was shipped for them to A. B. Hazard, of Elizabethport. Record pp. 46–7. This iron went into Hazard's yard as the property of the defendants, and out of it the 500 tons were shipped to the plaintiff. Previous to its shipment on the canal boats there was

no "appropriation of specific iron" to the contract. Record pp. 48 and 49.

III.

The mere fact that "the defendants had sued the Coplay Iron Company for not furnishing the quality of iron called for by their contract" had no pertinency to this suit, and was not offered as independent evidence. The question as to such a suit was preliminary, the object being the statement in reference to the shipment of the iron in question made in their complaint by the present defendants in their suit. If the defendants had made the same statements in a letter written by them to the Coplay Company it would undoubtedly be competent evidence against them. The circumstance that it was a solemn judicial complaint, verified by the oath of one of the defendants, made it none the less so.

Wharton on Evidence, §§ 1116, 1119, 1120.

It is true that Mr. Pope testifies that all the information he had as to the quality of the iron was derived from Mr. Allis. But as to that he was manifestly in error. The complaint was sworn to January 8, 1881. Record p. 34. "In August or September, 1880," he also testifies, "we sent a man, William B. Brownell, to Milwaukee to examine the iron shipped to Allis and report to us its quality." Record p. 32, at bottom. So far as the allegations were made on information and belief they were doubtless entitled to but a qualified weight. So the Court instructed the jury, viz: "In determining what weight as an admission that complaint should have, all its allegations should be taken into consideration, and the defendants in that connection are entitled to the benefit of the fact that their allegation in relation to the quality of the iron in question was made upon information and belief." Record p. 62.

The books cited are no authority against the admissibility of this evidence. In *Roe vs. Farrars*, 2 B. & P., 542, it is suggested that "if the *defendant* give in evidence an answer in chancery of the plaintiff, it will not entitle the *plaintiff* to avail himself of any matters contained in such answer which are only stated as hearsay." The correctness of this is not free from doubt.

1 Greenleaf on Ev., § 202.

Wharton on Ev., § 1109.

Be it as it may, it only goes to the position that the party who made the statement can not make it self-serving.

In *Lord Trinelstown vs. Kemmis,* 9 Clark & Fin., 779, the admissibility of two statements contained in an answer in chancery in a former suit were in question. The first was that "Thomas Lord Trinelstown had heard and believed that, etc."; the second was "that the Lady Mary had informed him that she had refused, etc."

Lord C. J. Tindal says of the first that if admissible it was irrelevant to the inquiry. As to the latter, he says that it is open to the objection that it is heresay evidence only, not even accompanied with an averment that he believed it to be true, and he holds it inadmissible. The clear implication is that if it had been an averment upon information *and belief,* it would have been held admissible. So the learned reporters viewed it, and stated the point in the syllabus. Lord Brougham in his opinion, p. 784, so states the conclusion of the judges to be, saying, "the learned judges hold * * that a declaration or statement of a person so circumstanced would not be admissible in evidence if it were only a statement of something which he had heard from some other person, *and not his own opinion* of his title." Then he intimates his own opinion that the distinction affects the weight rather than the admissibility of the evidence. Thus the decision is in accord with the rule in chancery which treats the statement of a party that *he believes,* or is *informed and believes,* as an admission, while the mere statement that he is informed may not be so regarded.

3 Greenl. on Ev., 282.
2 Dan. Ch. Pr., 980.

In point of fact, the complaint was not introduced for the purpose of the little proof it contained as to the quality of the iron. That was out of the question. The plaintiff had proven it satisfactorily, and the defendants substantially admitted it when they declared at the trial that they would offer no testimony to dispute that of the plaintiff on the subject. There could be no error, therefore, even if the evidence had been incompetent on that subject.

The objection was to the admissibility of the complaint. It contained other allegations which were unquestionably admissible and material, notably the fact that the plaintiff had never accepted the iron.

IV, V, VI and VII.

These remaining points discussed in the brief for the plaintiffs in error resolve themselves into the single question, whether the Court ought to have taken the case from the jury

and directed a verdict for the defendants. If the case was one for the jury it cannot be doubted that it was left to them fairly with correct and adequate instruction. The argument is that while it is true that the iron, which arrived at Milwaukee, fell far short of No. 1 extra in quality, there is no proof that this was the same iron which the defendants loaded on the canal boats at Elizabethport. The iron was shipped at Elizabethport *consigned to Milwaukee* in the usual course of traffic. When thus shipped it was separated from other iron, appropriated to the contract and to its destination. In due course it arrived in Milwaukee. Is not every sound inference that the iron which came was the iron which was shipped? Without such an inference the consignee would not be justified to take it into his possession. The bills of lading confirm it. The iron left Elizabethport in five canal boats, the Bertha, D. H. Winans, John Pillman, Kiowa and B. J. Hunting. Record pp. 48, 54–5. Of these cargoes the Mary Collins forwarded the first two, the R. C. Crawford the others from Buffalo to Milwaukee, in each case with part of the Scotch iron which the defendants shipped to the plaintiff. Record pp. 53–4. What right have Court or jury on a vague suggestion that "it might have been" to infer that this iron was changed in transit? It would be contrary to the natural order of things, a surprising exception from the usual course of things. That things in a given case went their natural and usual course is always, as it must be, a legitimate inference. We submit that if there was warrant for taking this case from the jury it was in favor of the plaintiff, and not in favor of the defendants—that the plaintiffs in error have no cause for complaint.

J. G. JENKINS, WINKLER & SMITH,
Counsel for defendant in error.

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Supreme Court of the U. S.

October Term, 1885.—No. 34.

THOMAS J. POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR.

vs.

EDWARD P. ALLIS, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR IN REPLY TO THE SUPPLEMENTAL BRIEF OF THE PLAINTIFFS IN ERROR.

EPPA HUNTON,
JEFF CHANDLER,
Counsel for Def't in Error.

Supreme Court of the U. S.

October Term, 1885.—No. 84.

THOMAS J POPE AND JAMES E. POPE, PLAINTIFFS IN ERROR.

vs.

EDWARD P. ALLIS, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR IN REPLY TO THE SUPMENTAL BRIEF OF THE PLAINTIFFS IN ERROR.

Counsel for the plaintiffs in error maintains that they had on the 15 of March, 1880, 60 tons of No. 1 Extra American iron; that this iron was shipped to Hazard, at Elizabethport, New Jersey, for the plaintiffs in error; that by the 10th May, 1880, 440 tons more had been received by Hazard for plaintiffs in error, which together made up the 500 tons in controversy in this suit.

This iron was held at Elizabethport by Hazard for the plaintiffs in error, and until the same was shipped on board the canal boats for the defendant in error, there was no appropriation of the specific iron to the defendant in error, because up to that date the iron was held in the name of the plaintiffs in error, and was in no sense appropriated by them to the defendant in error.

So that we maintain, as stated in our supplemental brief, that there was no appropriation of iron to the contract between the plaintiff and the defendant until the same was placed upon the canal boats for the purpose of shipping the same to Milwaukee.

The plaintiffs in error were bound by their contract to place this iron on board the canal boats, and unless they delivered on board the canal boat the 500 tons of Extra American pig iron, they did not comply with the contract with the defendant in error, and it does not matter whether the plaintiffs in error had at Elizabethport a large amount of No 1 Extra American pig iron, if they did not place the 500 tons thereof on board the canal boats for the defendants in error they did not comply with the contract in dispute.

So that we maintain again, that there was no appropriation of this iron to the defendant in error, until the same was placed upon the canal boats, and by bill of lading consigned to the defendant in error at Milwaukee. And the presumption arises that the iron shipped by the plaintiffs in error on board the canal boats at Elizabethport was the identical iron which reached Milwaukee for the defendant in error.

The counsel for the plaintiff in error in his supplemental brief maintains that the purchaser of personal property upon breach of warranty of quality cannot rescind the contract of purchase ~~on a~~ and sale in absence of fraud, and sue for the recovery of the purchase price, and for this principle he quotes Benjamin on Sales, vol. 1, p. 546, sec. 623, 4th American Edition by Corbin; also the case of Thornton v. Wynn, 12 Wheaton, 183; and Lynn v. Bertram, 20 Howard, 149. In the first place no such point was raised in the court below, and for that reason should

not be considered here. It is true that plaintiffs in error moved the court in the trial to ~~instruct~~ the jury to find a verdict for defendants, but it was not on the ground that the defendant in error had mistaken his remedy. On the contrary it is distinctly stated in the brief signed by Wm. P. Lynde, to be "on the ground that there was no evidence in the case sustaining the contract as it was set forth in the complaint, that the iron was to be delivered in Milwaukee." This will be found No. 4, page 14, brief of Wm. P. Lynde, who tried the case in the court below.

The learned counsel for plaintiffs in error admits that in the different States of the United States this question has been decided differently, and that in the State of Wisconsin, where this action arose and was tried, the courts have decided that the purchaser of personal property upon breach of warranty of quality can rescind the contract of purchase and sale in the absence of fraud, and sue for the recovery of the purchase money.

Now we maintain that this question has never been decided in this court. The case of Thornton v. Wynn, was an action brought by the defendant in error against the plaintiff in error in the Circuit Court of the District of Columbia, upon a promissory note given by one Miller to Thornton, and by him endorsed to Wynn; that this suit was upon a note given for part purchase money of a race horse sold by the plaintiff to the defendant, the said Miller, the drawer of the note for $3,000, of which $2,000 had been paid. At the time of sale the plaintiff warranted the horse sound, and declared him capable of beating any horse in the United States. The defendant offered evidence to prove that the said horse at the time of sale was utterly unsound and broken down, and had been broken down whilst in the plaintiffs'

possession, and wholly unfit for. and incapable of, the action and fatigue necessary to a race horse. The court instructed the jury that if they should be of opinion from said evidence that the said horse was, at the time of the said sale, utterly unsound and broken down, and had been broken down whilst in the possession of plaintiff, and was wholly unfit, and incapable of the action and fatigue necessary to a race horse, but that the said facts were not known to the plaintiff at the time of the said sale, the said facts are not a sufficient defence in this action to prevent the plaintiff from recovering.

Thereupon a verdict was found for the plaintiff.

Mr. Justice Washington, in delivering the opinion of this court, did use the language quoted by the attorney in the supplemental brief, but we must bear in mind that this was an action on a note for the part of the purchase money of the property sold and warranted; that the plaintiff had been paid two-thirds of the purchase money, and that it was therefore impossible to place him in the same position by a return of the property and rescision of the contract.

But this question came up again before this court in Lynn v. Bertram, 20 Howard, 149. The action in this case grew out of a contract for the purchase of a cargo of flour, described as Haxall flour, the price to be determined at so much a barrel for super-fine on inspection, and a less price for what was inspected "bad." The purchaser of this flour received and paid for two portions of the cargo, and then finding it was not marked Haxall, refused to take the balance; and this court decided that he could not repudiate the contract upon the ground that the brand upon the flour was not that for which he contracted.

In this case the court reviews the law upon this subject. and especially Thornton v. Wynn, 12 Wheaton, 183, and then says:

"If the verdict had found that the defendant had sustained any damage from the difference in the brands on the flour, the price would have been diminished accordingly; and so the defendant might have been indemnified upon an action commenced by himself, alleging a breach of the contract. *But, without considering whether he could refuse to accept any portion of the flour for the variance from the letter of his contract,* we decide that he lost this power when he applied to have paid for, and sold the parcels on the 25th and 21 of January, 1853."

So that in this case of Lynn v. Bertram, the court expressly declined to consider whether he could have refused to accept any portion of the flour for the variance from the letter of his contract, but did decide that he lost that power when he received a portion of it.

So that it is true that the Supreme Court of the United States has never decided that the purchaser of personal property upon breach of warranty of quality cannot rescind the contract of purchase and sale in the absence of fraud, and sue for the recovery of the purchase price.

But in that case the court quoted with approval the note to Cutter v. Powell, Smith's Leading Cases, vol. 2, part 1, p. 20, in which the annotator says:

"It is settled by Street v. Blay, and Poulton v. Lattimore, where an article is warranted and the warranty is not complied with, the vendee has three courses, anyone of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it and bring a cross action for the breach of the warranty. 3. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price."

Judge Campbell, who delivered the opinion of the court in Lynn v. Bertram on page 154, says:

"But while the first proposition of the note in the leading cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it, cannot then rescind the contract." This principle is stated in Hunt v. Silk, 5 East., 449, in which Lord Ellenborough, says:

"Where a contract is to be rescinded at all, it must be rescinded in *toto*, and the parties put in *statu quo* * * A contract cannot be rescinded without mutual consent, when circumstances have been so altered by a part execution that the parties cannot be put in *statu quo*, for if it be rescinded at all, it must be rescinded in *toto*."

It will be seen by a careful consideration of this case that the court decided that where a party had proceeded to use a portion of the property purchased, and could not therefore put the vendor in the same position he was when he made the sale, that the vendee lost his power to rescind the sale and must rely upon his action for a breach of contract.

But the case under consideration presents the fact that the defendant in error had never received or used any portion of the iron purchased, and that when he undertook to rescind the contract the vendor by the rescision of the contract would have been in the same position he was when he sold it.

In the same volume of Smith's leading cases, and on the same page, the annotator says:

"But where subject-matter is not in existence or not ascertained at the time of contract, an engagement that it shall, when existing or ascertained possess certain qual-

ities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation on the vendee under the contract, because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

Morehouse v. Comstock, 42 W., 626.
State v. Torrey, 2 Zab., 190.
Wolcott v. Mount, 7 Vr., 263.
Morse v. Bracket, 98 Mass., 209.
Boardman v. Spooner, 13 Allan, 361.
Boothby v. Scales, 27 Wisconsin, 626.
Fairfield v. Madison Manf. Co., 38 Do., 346.
Bryant v. Isburgh, 13 Gray, 607.
Woodle v. Whitney, 23 Wis., 55.

Churchill v. Price 44 Ills., 540

Now it will be seen from the evidence that at the time of the sale by the plaintiff in error to the defendant in error, of the 500 tons of iron, that iron was not in existence as the property of the plaintiffs in error.

According to the authorities above cited, this agreement that the iron should be of certain quality was not a mere warranty, but a condition, and until the plaintiffs in error complied with this condition, to wit: to place on board the canal boats at Elizabethport, New Jersey, 500 tons of No. 1 Extra American iron; he had not complied with a condition precedent, and no obligation rested upon the vendee under the contract either to receive or to pay for any iron that did not come up to the quality he engaged to deliver.

In Benjamin on Sales, same edition, sec. 635, the doctrine is laid down as follows:

"It is undoubted law, that if property not specific is contracted for, and warranted to possess certain qualities, and inferior property is tendered, the buyer may refuse to receive it and may return it after examination or trial."

See also:

Knoblauch v. Kronschaubel, 18 Minn., 300.

Bigger v. Bovard, 20 Kansas, 204.

Kimball v. Vroman, 35 Mich., 310.

Smoot v. U. S., 15 Wal., 36

2nd. Benjamin on Sales, at sec. 918, further says:

"When the vendor sells an article by a particular description it is a condition precedent to his right of action that the thing which he offers to deliver or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as a warranty, saying: 'A good deal of confusion has arisen in many of the cases on this subject from the the unfortunate use of the word "warranty". Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and though part of the contract, collateral to the express object of it. But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a waranty, and a breach of such a contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as if a man offers to buy peas of another and he sends him beans he does not perform the contract; but that is not a warranty; there is no warranty that he should sell him peas, and the contract is to sell him peas and if he sells him anything else in their stead it is a non-performance of it."

See also Chanter v. Hopkins 4th M. & W. 399

Shand v. Bows 2 App. Cases 480

Lord Blackburn in the latter case at page 480 says:

"If the description of the article is different in any re-

spect it is not the article bargained for and the other party is not bound to take it."

Benjamin on Sales, in sec. 918, says:

"There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a concondition precedent to the purchasers liability, and if this condition be not performed the purchaser is entitled to reject the article, or if he has paid for it to recover the price as money had and received to his use."

This doctrine is fully sustained in Nichol v. Godts 10, Hurlstone & Gordon's Ex. R. 194.

In the latter case, Pollock, C. B., says:

"By the terms of the contract it must be taken that the plaintiff agreed to deliver foreign refined rape oil and not that he professed to sell any oil whatever. It could not be contended if it turned out that the oil was whale oil, the contract would have been performed."

See Joslings v. Kingsford, Scott's Com. Bench Reports, 447.

It is unquestionably true that when the parties to this suit made the contract under consideration, it was not intended by the parties that the defendant in error should receive or see the property until it was landed in the city of Milwaukee; and therefore, according to the authorities above-cited, it was the duty of the plaintiffs in error to deliver upon the canal boats at Elizabethport, New Jersey, 500 tons of iron answering the description in the contract, and that the defendant in error had the right to reject this iron when he first had the opportunity to examine it, upon finding that the plaintiffs in error had not complied with their contract.

Defendant sent to them iron of mixed quality, instead of 500 tons of No.1 Extra American iron; that is the plaintiffs in error had placed on board the canal boats at Elizabeth-

port, New Jersey, iron different from that which they contracted to deliver there, the defendant in error had a right to reject the iron when inspected at Milwaukee and to bring his suit to recover the money which he paid for the purchase of this iron, because the iron which was sent by the plaintiff's in error was not the iron purchased of them by the defendant in error.

So that the doctrine of warranty and the right under it to recover back the purchase price, instead of suing upon the breach of warranty, does not arise in this case and need not be considered.

It is that confusion which arises from the prevalent habit of treating such cases as warranty, and which was condemned by Lord Abinger in the case above referred to.

This case turns upon the principle that the defendant in error purchased of the plaintiffs in error a certain article by description, not specific in its nature, but 500 tons of American No. 1 Extra iron, and upon the failure of the plaintiffs' in error to furnish the article which they sold.

But if it be conceded that this was a mere warranty and not a condition precedent, it is maintained that the plaintiff in the court below had the right to treat the contract as rescinded, and sue to recover the purchase price.

The contract—whether a warranty or a condition precedent, was violated by the plaintiffs in error. What was the *remedy* for this wrong. It had to be governed by the law of the forum; the law of the county to the tribunal of which appeal is made.

It will be recollected that this suit was brought in the

State court, and by the plaintiffs in error moved into the Federal court for the State of Wisconsin.

The forms of remedies, modes of proceeding and execution of Judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted. 11 M. & W., Ex. 877; 2 Rand. Va., 303; 24 Barb., 68; 17 Penn. State, 91.

See also Bank of U. S. v. Donally, 8 Peters, 372. Wilcox v. Hunt, 13 Peters, 212.

The *lex fori* governs as to the nature extent and character of the remedy.

Leroy v. Beard, 8 Howard, 451.
See also 17 Conn. 500, 37 N. Hamp., 86; 2 Pat. & Heath, Va., 144.

It is established by the Wisconsin cases cited above, and conceded by the counsel for the plaintiffs in error in the brief signed G. P. Miller, page 6; that in Wisconsin the law allows one party to rescind the contract when the other has violated his warranty—either express or implied.

The law of Wisconsin gives the remedy for this wrong. The defendant in error had the right to pursue it and this court will de guided by the law of Wisconsin where the suit originated.

The contract was rescinded by the defendant in error as soon as he saw the iron and ascertained it was not the iron he purchased. This is all that any of the authorities required.

EPPA HUNTON,
JEFF CHANDLER,
Counsel for Def't in Error.